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No. 12323

United States
Court of Appeals
For the Ninth Circuit.

EARL A. ERNST,

Appellant,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G.
CLEMENS and H. G. McBRIDE, doing busi-
ness as IDEAL MANUFACTURING COM-
PANY, ,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 322)

Appeal from the United States District Court
Southern District of California,
Northern Division.

FILED
JUL 1 1930
PAUL A. JERREN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern
District of California, Northern Division

Civil Action No. 721-ND

EARL A. ERNST,

Plaintiff,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G.
CLEMENS and H. G. McBRIDE, doing busi-
ness as Ideal Manufacturing Company,
Defendants.

COMPLAINT FOR INFRINGEMENT OF LET-
TERS PATENT No. 2,288,159 AND RE-
ISSUE No. 22,740

To the Honorable, the Judges of the District Court
of the United States in and for the Southern
District of California, Northern Division:

Plaintiff for his complaint alleges as follows:

I.

Plaintiff is a citizen of the United States and a
resident of Bakersfield, in the County of Kern, and
State of California, in the Southern District of
California, Northern Division.

II.

Defendants, and each of them, are citizens of the
United States and residents of Shafter, in the
County of Kern, and State of California, in the
Southern District of California, Northern Division.

III.

The jurisdiction of the Court depends upon the patent statutes of the United States of America, and more particularly section 24 of the Judicial Code, Par. 7, and R. S. Sec. 4921 (U.S.C., Title 35, sec. 70).

IV.

On June 30, 1942, United States Letters Patent No. 2,288,159 were duly and legally issued to Earl Ernst, administrator of Frederick J. Ernst, deceased, for an invention in Sacking Device, to which Letters Patent Joseph A. Ernst and Mary J. Ernst, husband and wife, and the surviving parents of the above named decedent, Frederick J. Ernst, were entitled under the laws of the State of California, the said decedent never having married and having died intestate.

By an instrument in writing, dated July 20, 1943, the said Joseph A. Ernst and Mary J. Ernst assigned, transferred and set over to the plaintiff herein, his successors or assigns, all their right, title and interest in and to said Letters Patent, together with all their right or rights of action for any past infringement of said Letters Patent, and since said date plaintiff has been and still is the owner of those Letters Patent.

V.

On April 2, 1946, United States Letters Patent Reissue No. 22,740 were duly and legally issued to plaintiff for an invention in Sack Jigger, and since that date plaintiff has been and still is the owner

of those Letters Patent, said Letters Patent being a reissue of original Letters Patent No. 2,347,474, dated April 25, 1944.

VI.

Defendants, and each of them, have for a long time past been and still are infringing those Letters Patent by making, selling and using sacking devices and sack jiggers embodying said patented inventions, and will continue to do so unless enjoined by this Court.

VII.

Plaintiff has placed the required statutory notice on all sacking devices and sack jiggers manufactured and sold by him under said Letters Patent, and has given notice to defendants and each of them of said infringement.

Wherefore, plaintiff demands a preliminary and a final injunction against further infringement by defendants and each of them, and those controlled by defendants and each of them, an accounting for profits and damages, that such damages be trebled, an assessment of costs against defendants, and that plaintiff be awarded a reasonable attorney's fee.

/s/ ALAN FRANKLIN,

Attorney for Plaintiff.

Of Counsel:

/s/ EARL MOORE

[Endorsed]: Filed April 29, 1948.

[Title of District Court and Cause.]

FIRST AMENDED ANSWER
TO COMPLAINT

Defendants for their first amended answer to the complaint of the plaintiff aver as follows:

I.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph I of the complaint.

II.

Defendants admit the averments contained in paragraph II of the complaint.

III.

Defendants admit the averments of paragraph III of the complaint.

IV.

Answering paragraph IV of the complaint, defendants admit United States Letters Patent No. 2,288,159 issued on June 30, 1942 to Earl Ernst, administrator of Frederick J. Ernst, deceased, but deny that said Letters Patent were duly or legally issued or that the subject matter thereof involved any invention, and as to the remaining averments of said paragraph IV defendants are without knowledge or information sufficient to form a belief as to the truth thereof.

V.

Answering paragraph V of the complaint, defendants admit that United States Letters Patent Reissue No. 22,740 issued to plaintiff on April 2, 1946, purporting to be a reissue of original Letters Patent No. 2,347,474, dated April 25, 1944, but deny that said reissue patent or said original patent were duly or legally issued, and deny that either of said Letters Patent involved an invention, and as to whether plaintiff has been or still is the owner of the said reissue Letters Patent defendants are without knowledge or information sufficient to form a belief as to the truth of the averments.

VI.

Defendants deny each and every averment contained in paragraph VI of the complaint.

VII.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph VII of the complaint concerning statutory notice, and as to the averment in said paragraph VII of the complaint that the plaintiff has given notice to defendants, and each of them, of asserted infringement defendants deny the same.

VIII.

As a further and separate defense to plaintiff's alleged cause of action, defendants aver that said Letters Patent No. 2,288,159 is invalid and void for the reason that the alleged invention thereof at-

tempted or purported to be patented therein and every material and substantial part thereof, had long prior to the alleged invention or discovery thereof by the said Frederick J. Ernst (applicant for said patent) or more than one year prior to the filing of any purported application for the said patent, been patented, described, contained and claimed in patents of the United States, as follows:

File Wrapper References

Name	Number	Filing Date	Patent Date
Bates	643,102	Sept. 20, 1899	Feb. 13, 1900
Norkewitz	860,936	Nov. 9, 1906	July 23, 1907
Cunningham	873,991	Sept. 16, 1907	Dec. 17, 1907
Nielsen	869,725	April 24, 1905	Oct. 29, 1907
Helenbolt	1,338,729	Sept. 24, 1919	May 4, 1920
McBride	1,504,894	Nov. 7, 1921	Aug. 12, 1924
Carpenter	1,532,228	May 29, 1923	April 7, 1925
De Baek	1,961,478	April 2, 1931	June 5, 1934
Vosler et al	2,026,200	Jan. 5, 1931	Dec. 31, 1935
Erickson et al	2,043,739	Dec. 2, 1933	June 9, 1936

Not File Wrapper References

Blank	805,625	July 6, 1905	Nov. 28, 1905
True	1,369,502	May 12, 1919	Feb. 22, 1921
Macbeth et al	1,465,609	March 24, 1919	Aug. 21, 1923
Paisley	1,818,427	Nov. 17, 1928	Aug. 11, 1931

IX.

As a separate and further defense to plaintiff's alleged cause of action, defendants, and each of them, further aver that the said Patent No. 2,288,159 is invalid and void for the reason that the said Frederick J. Ernst was not the original, first, true or sole inventor or discoverer of the alleged invention or discovery purported or attempted to be pat-

ented therein, or of any material or substantial part thereof, but that the same was fully disclosed, contained and described prior to the alleged invention or discovery thereof by the said Frederick J. Ernst or more than one year prior to the filing of any purported application for the said patent, in printed publications, including among others, the specifications, claims and drawings of each and every one of the patents identified in paragraph VIII hereof.

X.

As a separate and further defense to plaintiff's alleged cause of action, defendants, and each of them, further aver that if the claims of said patent are alleged or sought to be construed so as to dominate the alleged infringing devices used by the defendants, or any of them, then the said Frederick J. Ernst was not the true, original, first or sole inventor or discoverer of any material or substantial part or parts of the thing attempted to be patented, but that the same involved merely the exercise of ordinary mechanical skill and judgment in view of common knowledge and practice in the art long prior to said Frederick J. Ernst's alleged invention or for more than one year prior to his alleged application for said patent, such common knowledge and practice in the art being illustrated by way of example by the herein set forth patents.

XI.

As a separate and further defense to plaintiff's alleged cause of action, defendants, and each of

them, aver upon information and belief that in view of the knowledge, practice and state of the art at and prior to the date of filing of the application for said patent, it required no invention whatsoever but only the ordinary skill of the art to which the alleged invention of said patent appertains, to produce the alleged invention or discovery thereof, and that said patent is consequently invalid and void for lack of invention and for lack of patentable novelty.

XII.

As a separate and further defense to plaintiff's alleged cause of action, defendants, and each of them, further aver upon information and belief that said patent in suit No. 2,288,159 does not describe the alleged invention or discovery thereof, as required by law, in such full, clear, concise or exact terms as to enable any person skilled in the art or science to which it appertains or with which it is most clearly connected, to make, construct, employ or use the same, and that the said patent does not point out particularly and distinctly claim the parts, improvements or combinations claimed as the patentee's alleged invention or discovery, as required by law, and that the patent is, therefore, invalid and void for failure to comply with or satisfy the requirements of the statutes of the United States in such case made and provided and then and now in force, more particularly, Section 4888 R.S. (U.S.C.A. Title 35, Section 33).

XIII.

As a further and separate defense to plaintiff's alleged cause of action, defendants aver that said Letters Patent Re. 22,740 is invalid and void for the reason that the alleged invention thereof attempted or purported to be patented therein and every material and substantial part thereof, had long prior to the alleged invention or discovery thereof by the said Earl A. Ernst (applicant of said reissue patent and of said original patent No. 2,347,474) or more than one year prior to the filing of any purported application for the said patent, been patented, described, contained and claimed in patents of the United States, as follows:

File Wrapper References

Name	Number	Filing Date	Patent Date
Nielsen	869,725	April 24, 1905	Oct. 29, 1907
Keeran	893,516	Jan. 28, 1908	July 14, 1908
Broussard	1,025,781	Feb. 23, 1911	May 7, 1912
Stehlin	1,191,243	March 5, 1915	July 18, 1916
Cowley	1,225,586	Oct. 8, 1915	May 8, 1917
Sargent	1,352,225	April 14, 1919	Sept. 7, 1920
Williams	1,640,103	April 9, 1926	Aug. 23, 1927
Shaler	1,924,202	April 22, 1932	Aug. 29, 1933
Nicolas	2,119,174	July 1, 1936	May 31, 1938
Anderson	2,234,069	July 14, 1939	March 4, 1941
Belcher et al	2,234,953	May 22, 1939	March 18, 1941
Ernst	2,288,159	Sept. 30, 1940	June 30, 1942

Not File Wrapper References

Fuerste	420,049	Sept. 14, 1888	Jan. 28, 1890
Buschmann	435,681	Dec. 2, 1889	Sept. 2, 1890
Bradbury	826,988	June 8, 1905	July 24, 1906
Broussard	1,014,444	Sept. 18, 1911	Jan. 9, 1912
Nacher	1,719,124	Nov. 28, 1927	July 2, 1929

and in foreign patents as follows:

		British
Daniel Belcher	397,679	Sept. 15, 1932 Complete accepted August 31, 1933
		German
Felix von den Wyngaert	69,746	Patented Nov. 16, 1892
Peter Steimel	512,780	Patented Sept. 28, 1927

XIV.

As a separate and further defense to plaintiff's alleged cause of action, defendants, and each of them, further aver that the said Patent Re. 22,740 is invalid and void for the reason that the said Earl A. Ernst was not the original, first, true or sole inventor or discoverer of the alleged invention or discovery purported or attempted to be patented therein, or of any material or substantial part thereof, but that the same was fully disclosed, contained and described prior to the alleged invention or discovery thereof by the said Earl A. Ernst or more than one year prior to the filing of any purported application for the said patent, in printed publications, including among others, the specifications, claims and drawings of each and every one of the patents identified in paragraph XIII hereof.

XV.

As a separate and further defense to plaintiff's alleged cause of action, defendants, and each of them, further aver that if the claims of said patent are alleged or sought to be construed so as to dominate the alleged infringing devices used by the de-

fendants, or any of them, then the said Earl A. Ernst was not the true, original, first or sole inventor or discoverer of any material or substantial part or parts of the thing attempted to be patented, but that the same involved merely the exercise of ordinary mechanical skill and judgment in view of common knowledge and practice in the art long prior to said Earl A. Ernst's alleged invention or for more than one year prior to his alleged application for said patent, such common knowledge and practice in the art being illustrated by way of example by the herein set forth patents and publication.

XVI.

As a separate and further defense to plaintiff's alleged cause of action, defendants, and each of them, aver upon information and belief that in view of the knowledge, practice and state of the art at and prior to the date of filing of the application for said patent, it required no invention whatsoever but only the ordinary skill of the art to which the alleged invention of said patent appertains, to produce the alleged invention or discovery thereof, and that said patent is consequently invalid and void for lack of invention and for lack of patentable novelty.

XVII.

As a separate and further defense to plaintiff's alleged cause of action, defendants, and each of them, further aver upon information and belief that said patent in suit Re. 22,740, does not describe the

alleged invention or discovery thereof, as required by law, in such full, clear, concise or exact terms as to enable any person skilled in the art or science to which it appertains or with which it is most clearly connected, to make, construct, employ or use the same, and that the said patent does not point out particularly and distinctly claim the parts, improvements or combinations claimed as the patentee's alleged invention or discovery, as required by law, and that the said patent is, therefore, invalid and void for failure to comply with or satisfy the requirements of the statutes of the United States in such case made and provided and then and now in force, more particularly, Section 4888 R. S. (U.S. C.A. Title 35, Section 33).

XVIII.

As a separate and further defense to plaintiff's alleged cause of action, defendants aver upon information and belief that there did not exist statutory grounds to legally justify the reissue of the original United States Letters Patent No. 2,347,474 and that the Commissioner of Patents exceeded his authority in granting said reissue.

XIX.

Defendants allege on information and belief that intervening rights occurred in their favor as against the plaintiff between the date of the grant of the original Letters Patent No. 2,347,474 and the date of the application of the alleged Reissue Letters Patent No. 22,740.

XX.

Defendants deny that they, or any of them, have ever infringed said Letters Patent No. 2,288,159 or Reissue Patent No. 22,740, or that they intend to infringe both, or either of said Letters Patent.

Wherefore, the defendants, and each of them, pray that:

1. They, and each of them, be adjudged not to have infringed said Letters Patent, or either of them,

2. Said Letter Patent, and each of them, be held void,

3. Plaintiff's complaint be dismissed and that plaintiff take nothing thereby,

4. Defendants, and each of them, be awarded their costs incurred herein including reasonable attorneys' fees, and

5. For such other and further relief as the Court may deem just and proper in the premises.

Dated: December 14, 1948.

HERBERT A. HUEBNER and
RICHARD M. WORREL

By /s/ HERBERT A. HUEBNER,
Attorneys for Defendants.

It Is Stipulated that this First Amended Answer may be filed. Dec. 15, 1948.

/s/ ALAN FRANKLIN,
Attorney for Plaintiff.

[Endorsed]: Filed December 23, 1948.

[Title of District Court and Cause.]

STIPULATION CONCERNING USE OF COPIES OF DOCUMENTARY EVIDENCE

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled suit that uncertified, printed or photostat United States Patent Office copies of United States Letters Patent, without proof that they are such copies, but appearing on their faces to be such, may be introduced in evidence and used in said suit with the same force and effect as though proved to be original or certified copies thereof, and further that the date of application for each of said patents, appearing on the face thereof, shall be deemed and considered as proof of and as the filing date of the application for such patent, and that if error appear, true copies shall be substituted at the expense of the party offering such papers; and it is further stipulated and agreed that uncertified, printed or photostat copies of foreign Letters Patent, as supplied by the countries issuing such patents or as supplied by the United States Patent Office, may be introduced in evidence and used in said suit with the same force and effect as though proved to be originals thereof, and further that the dates appearing upon the faces of such copies of foreign patents indicative of material facts such as, for example, publication, grant, patenting, delivery, etc., shall be deemed and considered as proof of and as the dates of such material facts; all subject to the rights of either party to prove any such copy, by the introduction in evidence of the

original or of a certified or duly authenticated copy, to be other than a true and correct copy; and likewise subject to the rights of either party to offer objections as to the admissibility of any thereof on the grounds of immateriality, incompetency or irrelevancy.

It Is Further Stipulated that translations of said uncertified, printed or photostat copies of foreign Letters Patent represented by counsel to have been made by Singer, Ehlert, Stern & Carlberg, a law firm specializing in foreign patent and allied matters, of 28 East Jackson Boulevard, Chicago, Illinois, or under its supervision, may be introduced in evidence and used in said suit with the same force and effect for all intents and purposes as though proved by the translator thereof, in the same manner as the copies of United States Letters Patent, and likewise subject to objections as to admissibility of any thereof on the grounds of immateriality, incompetency or irrelevancy, as aforesaid.

Dated: March 4, 1949.

/s/ ALAN FRANKLIN,

Attorney for Plaintiff.

HERBERT A. HEUBNER and
RICHARD M. WORREL,

By /s/ HERBERT A. HUEBNER,
Attorneys for Defendants.

Approved and it is so ordered.

/s/ LEON R. YANKWICH.
Judge.

[Endorsed]: Filed March 8, 1949.

In the District Court of the United States, Southern
District of California, Northern Division

No. 721-ND

EARL A. ERNST,

Plaintiff,

vs.

A. C. CLEMENS, et al.,

Defendants.

DECISION

Honorable Leon R. Yankwich, Judge.

The above-entitled cause heretofore tried, argued and submitted, is now decided as follows:

The Court finds:

(1) That Claim 1 of Patent No. 2288159 (F. J. Ernst) issued June 30, 1942, is valid, but not infringed by the defendants.

(2) That Claim 1 of Reissue Patent No. Re. 22740, reissued on April 2, 1946, is valid, but not infringed by the defendants.

Judgment will, therefore, be for the defendants. Neither side to recover any costs. Counsel for the defendants to prepare findings and judgment under Local Rule 7.

COMMENT

The case before us does not involve any novel principles of patent law. Instead, practically every one of the principles urged have been recognized by

me in opinions written over a course of years. Among which may be cited: *Hookless Fastener v. Greenberg*, 1937, D.C.Cal., 18 Fed. Sup. 296; *Mantz v. Kersting*, 1939, D.C.Cal., 29 Fed. Sup. 706; *Joyce v. Solnit*, 1939, D.C.Cal., 29 Fed. Sup. 787; *Joyce v. Fern*, 1940, D.C.Cal., 32 Fed. Sup. 401; *Kammerer V. McCullough*, 1941, D.C.Cal., 39 Fed. Sup. 213; *Holmes v. Atlas Garage Door*, 1945, D.C.Cal., 63 Fed. Sup. 692; *Blanchard v. Pinkerton*, 1948, D.C. Cal., 77 Fed. Sup. 861.

In this case, as stated at the oral argument, a situation confronts us similar to what arose in many of the cases to which reference has been made. An inventor in a crowded field, after endeavoring to secure a patent with broad claims, finally succeeds in securing a limited number of claims for a specific device. In endeavoring to keep others out of the field, he seeks, apparently in good faith, to broaden the scope of his claims by reference to the specifications. This cannot be done. I epitomized the matter in three brief sentences in *Blanchard v. Pinkerton*, *supra*; at p. 862:

“The specifications may be resorted to in order to resolve ambiguities. They may limit, but they cannot enlarge the claims. But in the last analysis, if there be infringement, it is the claims that are infringed and not the specifications.”

In a situation like the present one, we are in between a veritable Scylla and Charybdis. If we interpret the claims as they stand, there is no infringement. If, on the other hand, by resort to the

specifications, we interpret them broadly and carry into the claims the elements which are not in them, we land the device in the prior art, and there is no invention. Unless we are dealing with a patent of design or form in which the specifications and the exemplifications of the device play an important part, only when there is ambiguity in the claims is resort to the specifications justified. And there is no ambiguity in Claim 1 of either patent. In analyzing claims, in order to determine infringement, a good test, although not an infallible one, is to read the claim upon the accused devices. Such test here, as I indicated at the oral argument, and as further study confirms, is fatal to the claim of infringement. And this result follows from the comparison of the two patents given at the trial by Mr. E. A. Ernst, one of the plaintiffs, who was associated with his deceased brother, Frederick J. Ernst, in the development and exploitation of Patent No. 2288159 and who is the inventor in Patent Re. 22740. We find, as a consequence that, as to each of the patents, Claim 1 does not read upon the accused devices, unless the person who endeavors to so read them does, by quick mental processes, substitute equivalents for almost everyone of the fundamental elements in the patented device. This means carrying the doctrine of equivalents too afar. To illustrate briefly:

Referring to Patent No. 2288159, Ernst's analysis shows that Element 1 (a pair of spaced bars longitudinally of the belt) is not present; Element 2 (a loose sleeve on each bar) is not present, unless the

wheels and latch take their place. (See Exhibit 11b); Element 3 (a plate having a portion of its ends in the coupling means) is not present. The sheer plate takes its place (52); Element 4. The accused device has no coupling means. The rod and rollers must take their place. (They appear on Fig. 3 to the right of 56).

As to Patent Re 22740, Ernst's analysis shows: Element 1: Instead of Pitman adjacent the platform, we find a cross bar (Exhibit 11c); Element 2: Instead of a central open locus, the accused device shows a board, not at center (Exhibit 11a); Element 3: A rigid connection takes the place of one long board. (The jigger connection is at the end of the machine).

To find any similarity at all in the photographic representation of the accused device, Ernst combines two platforms (Elements (1) and (3) in order to arrive at one effect. (Element 2) The claims in this patent, as Ernst reads them, are almost identical with British Patent No. 397679 (Belcher). Indeed, even as written, they read on the accused device. This, of course, does not help the plaintiff because, in that event, both he and the defendants are infringing the British patent. In like manner, the claims on Patent No. 2277159 as Ernst would interpret them are in the prior art. Indeed, the plaintiff's expert, Harry Gearing, in his deposition, admits that anyone skilled in the art could have constructed the devices by slight modification of their teachings. But we need not rely upon such admissions. Ernst's

analysis and our own study of the claims involved, and the accused devices, in the light of the prior art and of accepted principles of patent law, leads to the inevitable conclusion that Claim 1 in each of the patents in suit, as worded and limited to the device which each describes clearly and without ambiguity is valid, but not infringed by the devices of the defendants now in use.

Hence the ruling above made.

Dated this 12th day of March, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed March 12, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Findings of Fact

I.

Plaintiff is a citizen of the United States and a resident of Bakersfield, in the County of Kern, and State of California, in the Southern District of California, Northern Division.

II.

Defendants, and each of them, are citizens of the United States and residents of Shafter, in the County of Kern, and State of California, in the Southern District of California, Northern Division. The defendant McBride purchased the defendant Clemens' interest in the business known as Ideal Manufacturing Company since the Complaint was filed and assumed all liabilities as well as gaining all assets.

III.

This action was instituted by the plaintiff for alleged infringement of United States Letters Patent Nos. 2,288,159 and Reissue 22,740 under Section 24 of the Judicial Code, Paragraph 7, and R. S. Sec. 4921 (35 U. S. C. 70), and defendants in their Answer attacked the validity of said patents and denied infringement thereof. Plaintiff charged only claim 1 of each patent to be infringed, and the remaining claims were not involved.

IV.

On June 30, 1942 United States Letters Patent No. 2,288,159 were duly and legally issued to Earl Ernst, administrator of Frederick J. Ernst, deceased, for an invention entitled Sacking Device, and by assignment from the heirs of said Frederick J. Ernst, on or about July 20, 1943, plaintiff became and still is the owner of said patent and of all rights of action for past infringement.

V.

On April 2, 1946 United States Letters Patent Re-issue No. 22,740 were duly and legally issued to plaintiff for an invention entitled Sack Jigger, and since that date plaintiff has been and still is the owner of those Letters Patent, said Letters Patent being a re-issue of original Letters Patent No. 2,347,474, dated April 25, 1944.

VI.

The apparatus shown and described in Patent No. 2,288,159 comprises in general endless traveling belts for conveying articles, brackets mounted on a frame along the belts for holding sacks to be filled, and a long stationary platform below the brackets to support the bottoms of the sacks. Above each of the belts is a pair of bars fixedly mounted. Sleeves are loosely mounted for sliding movement on the bars, and are connected by couplings to opposite notched corner ends of a shear plate by which the shear plate is obliquely mounted above and adjacent to the belt and can be moved along the bars to change the location of the shear plate. The apparatus is suitable for handling various kinds of articles. Claim 1 in suit does not refer to a sacking device or to a structure designed for handling any specified articles, but defines a device for unloading belt conveyors of articles in general, thus entering a broad field of art.

VII.

Claim 1 of said Patent No. 2,288,159 is limited, among other things, to a pair of spaced bars longi-

tudinally of the conveyor belt and substantially the length thereof, the bars being spaced above and substantially over the longitudinal edges of the belt. It is further limited to a loose sleeve on each bar, and the sleeve having attached coupling means to hold the shear plate. Still further limitations are that the plate has a portion of its ends in the coupling means, and the coupling means forms an acute angle with the sleeves. The prosecution in the Patent Office, the prior art, and admissions by plaintiff and his expert witness, as well as the testimony of defendants' expert, necessitate that the claim be read with these limitations. If interpreted more broadly, it would encroach upon the prior art.

VIII.

The apparatus shown and described in Patent No. Reissue 22,740 comprises in general an apparatus like that previously described for Patent No. 2,288,159 but with the following material differences: the platform is swingably hung on hinged links; it has cleats which in part establish sack stations; it has a central area (open locus) unoccupied by cleats or surmounted by sack brackets; and a power driven eccentric mechanism is located in that central region, having a pitman attached to an upstanding rigid coupling member bolted to the platform at the central area, for shaking the platform to settle the contents of the sacks being filled. Claim 1 in suit does not refer to structure designed for handling any specified articles, but defines a device for shaking containers and the like in general, thus entering a broad field of art.

IX.

Claim 1 of said Patent No. Reissue 22,740 is limited, among other things, to a platform with an elongated surface having container stations from the ends thereof to a central open locus, a pitman adjacent the platform, and coupling means connecting the pitman with a portion of the platform at this central open locus. The prosecution in the Patent office of the original Patent No. 2,347,474 and of the reissue, the prior art, and the admissions of plaintiff and his expert witness, as well as the testimony of defendants' expert, necessitate that the claim be read with these limitations. If interpreted more broadly, it would encroach upon the prior art.

X.

Claim 1 of said Reissue Patent 22,740 is identical to Claim 1 of said original Patent No. 2,347,474. Broader claims were sought in the reissue application but were rejected. From a final rejection Earl A. Ernst, the plaintiff, appealed to the Board of Appeals of the Patent Office, who affirmed the action of the Examiner, and the plaintiff then acquiesced in the rejection and accepted, among others, the same narrow Claim 1 of the original patent.

XI.

All of the patents pleaded in the Amended Answer as prior art were offered in evidence. The file wrappers and contents of No. 2,288,159, defendants' Exhibit "G", No. 2,347,474, defendants' Exhibit "H", and Reissue No. 22,740, defendants' Exhibit

“I”, the patents in suit, were received in evidence. Copies of all of the prior art patents pleaded in the defendants’ Amended Answer, including translations of the two German patents, were received as a single exhibit, defendants’ Exhibit “F”. In addition to these the plaintiff offered a prior art patent to Antony Wertenbruch, No. 1,616,016, plaintiff’s Exhibit 14. Expert testimony as to some of the prior art patents was presented by the plaintiff in the form of the deposition of Harry Gearing, plaintiff’s Exhibit 16. Expert testimony as to some of the prior art patents was presented by the defendants’ witness, Walker Glenn, who testified in open court. In addition to the prior art patents concerning which testimony was given, the Court considered all of the remaining prior art patents. Those advanced by the defendants as particularly pertinent in respect to Patent No. 2,288,159 were Cunningham, No. 873,991, and Helenbolt, No. 1,338,729, with which the Court concurs. Those advanced by the defendants as particularly pertinent to Patent Reissue No. 22,740 were Bradbury, No. 826,988 (not a file wrapper reference) and Naecher, No. 1,719,124 (not a file wrapper reference) with which the Court concurs. The Court also finds that the British patent to Belcher, No. 397,679, is particularly pertinent (not a file wrapper reference).

XII.

Both patents in suit, by admissions of plaintiff’s expert and on all other evidence pertinent to the point, are in a crowded art. The plaintiff, by a

showing of commercial reduction to practice of the two inventions in the specific adaptation of such inventions to the sacking of potatoes, endeavored to limit the field of prior art applicable and thereby secure a broader interpretation of his claims; but the same general considerations and principles are involved in the handling of potatoes as numerous other articles, and neither of plaintiff's patents either in the descriptions or the claims in issue are so limited. Said claims as described are broad as to subject matter, specific as to elements and the combination thereof, and must be narrowly construed if they are to be held valid. [26]

XIII.

The defendants manufactured and sold machines intended to perform the same general functions as those of the plaintiff. The defendants' machines are illustrated in photographs, Exhibits 1, 2 and 3-3 attached to plaintiff's interrogatories, the latter being plaintiff's Exhibit 5, also in photographs plaintiff's Exhibits 11-A, 11-B, 11-C, 12-A and 12-B, a blueprint, plaintiff's Exhibit 13, and in photographs defendants' Exhibits "A", "B", "C", "D" and "E".

XIV.

That part of the defendants' machines relating to the unloading of belt conveyors by a shear plate may be described briefly as follows:

Form 1. An endless belt stretched between oppositely disposed parallel rollers with power means

to drive one of the rollers is adapted to convey potatoes or any other articles which are to be moved from one location to another and to be diverted at selected stages into containers or for further handling. The diversion is accomplished by a shear plate positioned diagonally across the belt. This plate is suspended from a pair of rods located above the belt somewhat shorter than the belt. A trolley comprising sheaves mounted in a framework is arranged for rollable travel on each of the rods. From the framework vertically depends suspension members, the lower ends of which are bolted to the shear plate. A vertical slot is provided in the suspension members so that the elevation of the shear plate may be adjusted. A latch arrangement is associated with the trolley for releasably securing the trolley at any one of various selected positions along the rods, illustrated particularly in Exhibits 1 and 2 attached to plaintiff's interrogatories which are plaintiff's Exhibit 5.

Form 2. This form is identical to Form 1, except that only one overhead rod and trolley association is employed. On the opposite side a horizontal track is formed as a part of a steel plate extending alongside the belt as an element of table framework upon which the rollers and associated mechanism are supported. On this track for rolling movement is a sheave and axle which connects with one end of the shear plate, illustrated particularly in defendants' Exhibits "A" and "C" and plaintiff's Exhibit 11-B. A modification of no significance is shown in defendants' Exhibit "D".

XV.

That part of the defendants' machines which relates to the shaking mechanism may be described as follows:

Form 1. It is an apparatus for shaking bags or the like to settle the contents thereof, primarily while the bags are being filled. Such apparatus necessarily embodies a frame. It incorporates a pair of parallel traveling belts to convey articles from a remote location for distribution. At the delivery end of the traveling belt is a twin distributing apparatus as described in answer to Finding XIV, both forms having been employed. Each twin unit comprises in addition to the elements described in answer to Finding XIV a plank, or platform or table hingedly mounted upon the framework, this plank being suitable for the positioning thereon of a plurality of bags or other containers. A shaking means is provided in the form of an electric motor driving an eccentric which is coupled with a connecting strap, the opposite end of which is attached to the near end of the plank. The same motor and eccentric are utilized for powering two connecting straps individually attached to adjacent ends of the planks and consequently reciprocating both planks or platforms, illustrated in Exhibits 3-3 attached to plaintiffs interrogatories which are plaintiff's Exhibit 5.

Form 2. This form of apparatus is identical with the apparatus of Form 1 except that the inner ends of the two planks or platforms which remain

separated as before are fixedly inter-connected by a rigid strap or bar. The motor and eccentric mechanism are located at one extreme end of the rigidly connected platforms instead of between them and a single connecting strap communicates reciprocatory motion from the eccentric to the adjacent platform end, illustrated in defendants' Exhibit "A".

Form 3. This form of apparatus is identical to the apparatus of Form 1 except that in place of a pair of planks a single continuous plank is employed having the container stations formed thereon. The motor and eccentric mechanism are located at one extreme end of the plank, and a single connecting strap communicates reciprocatory motion from the eccentric to the plank, as illustrated in defendants' Exhibit "C".

Other modifications of no significance are shown in other exhibits.

XVI.

As to Patent No. 2,288,159, Claim 1, on the evidence and as admitted by the plaintiff, none of the defendants' machines embody a sleeve on the bars over the belt nor coupling means attached to a sleeve for holding a shear plate, nor does the shear plate of the defendants' machines have a portion of its ends in such a coupling means, nor any elements which under the facts can be construed as equivalents thereof. In these respects and others the defendants' machines are all different from Claim 1.

XVII.

As to Patent Reissue 22,740, Claim 1, on the evidence and as admitted by the plaintiff, none of the defendants' machines embody a platform with an elongated surface having container stations from the ends thereof to a central open locus, a pitman adjacent the platform, and coupling means connecting the pitman with a portion of the platform at this central open locus, nor any elements which under the facts can be construed as equivalents thereof. In these respects and others the defendants' machines are all different from Claim 1.

XVIII.

Claim 1 of Patent No. 2,288,159, when limited to the specific device described therein, is valid but not infringed by the devices of the defendants.

XIX.

Claim 1 of Patent Reissue 22,740, when limited to the specific device described therein, is valid but not infringed by the devices of the defendants.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction of the subject matter involved herein and of the parties hereto under the Patent Laws and the Judicial Code, more particularly R.S. Sec. 4921, 35 U.S.C. 70, and Sec. 24 of the Judicial Code.

2. That Claim 1 of the patent in suit, No.

2,288,159, is required to be narrowly construed and thus construed is valid.

3. That Claim 1 of the patent in suit, Reissue 22,740, is required to be narrowly construed and thus construed is valid.

4. That none of the accused devices infringes either of said Letters Patent in suit, No. 2,288,159 and Reissue 22,740.

5. That the Complaint should be dismissed for want of equity.

Dated at Los Angeles, California this 28th day of March, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

The foregoing Findings Of Fact And Conclusions Of Law are disapproved as to form:

March 22, 1949.

/s/ ALAN FRANKLIN,
Attorney for Plaintiff.

March, 1949.

HERBERT A. HUEBNER and
RICHARD M. WORREL,

By /s/ HERBERT A. HUEBNER,
Attorneys for Defendants.

[Endorsed]: Filed March 28, 1949.

In the District Court of the United States Southern
District of California, Northern Division.

Civil Action No. 721-ND

EARL A. ERNST,

Plaintiff,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G.
CLEMENS and H. G. McBRIDE doing busi-
ness as IDEAL MANUFACTURING COM-
PANY,

Defendants.

FINAL JUDGMENT

This action came on to be heard at this term of Court and was tried and argued by counsel for the respective parties, and thereupon, upon consideration thereof,

It Is Ordered, Adjudged And Decreed:

I.

That the Complaint herein be and it is hereby dismissed upon the merits.

II.

That both parties sustain their own costs, and no costs are to be taxed.

Dated at Los Angeles, California this 28th day of March, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

The foregoing Final Judgment is disapproved as to form:

March 22, 1949.

/s/ ALAN FRANKLIN,
Attorney for Plaintiff.

March, 1949.

HERBERT A. HUEBNER and
RICHARD M. WORREL,

By /s/ HERBERT A. HUEBNER,
Attorneys for Defendants.

Judgment entered March 28, 1949.

[Endorsed]: Filed March 28, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Earl A. Ernst, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 28, 1949.

/s/ ALAN FRANKLIN,
Attorney for Appellant.

[Endorsed]: Filed April 26, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

Good Cause Appearing Therefore, It Is Hereby Ordered that appellant may have to and including July 6, 1949, to file the record and docket the appeal in the above entitled cause in the United States Court of Appeals for the Ninth Circuit.

Dated: Los Angeles, California, June 2, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed June 2, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

Good Cause Appearing Therefor, It Is Hereby Ordered that appellant may have to and including July 23, 1949, to file the record and docket the appeal in the above-entitled cause in the United States Court of Appeals for the Ninth Circuit.

Dated: Los Angeles, California, July 1, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed July 1, 1949.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, that Fidelity and Deposit Company of Maryland, a corporation, organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto A. G. Clemens and H. G. McBride and A. G. Clemens and H. G. McBride doing business as Ideal Manufacturing Company, Defendant in the above case, in the penal sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to be paid to said Defendants, their successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, That Whereas, Earl A. Ernst, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment herefore entered in this action on March 28, 1949, in favor of the Defendants by the United States District Court for the Southern District of California, Northern Division, in the above entitled case.

Now, Therefore, if the above named appellant shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the

judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed By the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 28th day of June, 1949.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

[Seal] By /s/ V. L. N. PARKER,
Attorney in Fact.

Attest

/s/ S. M. SMITH,
Agent.

Examined and recommended for approval as provided in Rule 8.

/s/ ALAN FRANKLIN,
Attorney.

State of California,
County of Los Angeles.—ss:

On this 28th day of June, 1949, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared V. L. N. Parker known to me

to be the Attorney-in-Fact S. M. Smith, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] /s/ THERESA FITZGIBBONS,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 3, 1950.

I hereby approve the foregoing bond.

Dated the 19th day of July, 1949.

/s/ PAUL J. McCORMICK.

[Endorsed]: Filed July 19, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To the Clerk of the United States District Court
for the Southern District of California, Central
Division:

Please include in the transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit pursuant to the appeal to said Court, the following:

1. Complaint.
2. First Amended Answer to Complaint.
3. Decision of U.S. District Judge, dated the 12th day of March, 1949.
4. Findings of Fact and Conclusions of Law, dated the 28th day of March, 1949.
5. Final Judgment, entered the 28th day of March, 1949.
6. Notice of Appeal.
7. Cost Bond on Appeal.
8. Stipulation Concerning Use of Copies of Documentary Evidence.
9. Order Extending Time to File Record and Docket Appeal, dated June 2, 1949.
10. Order Extending Time to File Record and Docket Appeal, dated July 1, 1949.
11. This, Plaintiff's Designation of Contents of Record on Appeal.
12. Stipulation Extending Time to File Plaintiff's Designation of Contents of Record on Appeal.
13. Reporter's Transcript of Proceedings (2 Volumes).
14. Clerk's Certificate.
15. Plaintiff's Trial Exhibits.
1. Printed Copy of Letters Patent in suit of Frederick J. Ernst, No. 2,288,159, June 30, 1942, Sacking Device.

2. Printed Copy of Reissue Letters Patent in suit of Earl A. Ernst, No. Re. 22,740, April 2, 1946, Sack Jigger.

2-A. Printed Copy of Letters Patent in suit of Earl A. Ernst, No. 2,347,474, April 25, 1944, Sack Jigger.

3. Letters of Administration of Frederick J. Ernst.

4. Assignment of Letters Patent No. 2,288,159 to Earl A. Ernst.

5. Plaintiff's Interrogatories.

6. Defendants' Answers to Plaintiff's Interrogatories.

7. Photograph of Sacking Machine.

8. Photograph, Ernst Automatic Jigger.

9. Photograph, Ernst Automatic Jigger.

10. Photograph, Ernst Automatic Jigger.

11-A. Photograph, Defendants' Potato-Sacking Machine.

11-B. Photograph, Defendants' Potato-Sacking Machine.

11-C. Photograph, Defendants' Potato-Sacking Machine.

12-A. Photograph, Defendants' Potato-Sacking Machine.

12-B. Photograph, Defendants' Potato-Sacking Machine.

13. For Identification, Blue Print, Defendants' Machine.

14. Printed Copy of Naeher Patent No. 1,616,016.

15. Drawing of Ernst Jiggerboard and Suspension Links.

16. Deposition of Harry Gearing.

17. Plaintiff's Interrogatory Exhibits 1, 2 and 3-3.

DEPOSITION EXHIBITS

(Deposition of Harry Gearing)

3. Printed Copy of Stehlin Patent No. 1,191,243.

4. Printed Copy of Fuerste Patent No. 420,149.

5. Printed Copy of Buschmann Patent No. 435,681.

6. Printed Copy of Bradbury Patent No. 826,988.

7. Printed Copy of Broussard Patent No. 1,014,444.

8. Printed Copy of Naeher Patent No. 1,719,124.

9. Photostatic Copy of Belcher British Patent No. 397,679.

10. Photostatic Copy of German Patent of Felix von den Wyngaert, No. 69,746.

11. Photostatic Copy of German Patent of Peter Steimel, No. 512,780.

12. Printed Copy of Blank Patent No. 805,625.
13. Printed Copy of True Patent No. 1,369,502.
14. Printed Copy of Macbeth et al Patent No. 1,465,609.
15. Printed Copy of Paisley Patent No. 1,818,427.
16. Photograph of one of Defendants' Machines, Deposition of Harry Gearing (Interrogatory Exhibit 3.).

DEFENDANT'S EXHIBITS

- A. Photograph, Defendants' Machine.
- B. Photograph, Defendants' Machine.
- C. Photograph, Defendants' Machine.
- D. Photograph, Defendants' Machine.
- E. Photograph, Defendants' Machine.
- F. Folder.
- G. File Wrapper, Patent 2,288,159. [43]
- H. File Wrapper and Contents, Patent 2,347,474.
- I. File Wrapper and Contents, Patent Re. 22,740.

Dated: Los Angeles, California, this 18th day of July, 1949.

/s/ ALAN FRANKLIN,
Attorney for Plaintiff.

[Endorsed]: Filed July 19, 1949.

[Title of District Court and Cause.]

DEFENDANTS - APPELLEES' COUNTER-
DESIGNATION OF CONTENTS OF REC-
ORD ON APPEAL

The Defendants-Appellees under Rule 75(a) designate the following additional portions of the record, proceedings and evidence to be included in the record on appeal in addition to those items already designated by the Plaintiff-Appellant in his "Plaintiff's Designation of Contents of Record on Appeal" filed July 19, 1949:

1. Stipulation, Affidavit and Order for Extension of Time filed in the Court of Appeals July 22, 1949.

2. This Counter-Designation.

3. Defendants' Exhibit F, folder and contents comprising prior art patents and translations of foreign patents. (Plaintiff's designation specifies Defendants' Exhibit F "Folder" and implies but does not specify the contents here identified.)

4. Defendants' Exhibit G, file wrapper and contents of Patent No. 2,288,159. (Plaintiff's designation specifies Defendants' Exhibit G "File Wrapper" and implies but does not specify the contents which are essential.)

Dated at Los Angeles, California, July 26, 1949.

HERBERT A. HUEBNER and

RICHARD M. WORREL.

By /s/ HERBERT A. HUEBNER,

Attorneys for Defendants-
Appellees.

[Endorsed]: Filed July 30, 1949.

In the District Court of the United States for the
Southern District of California, Northern Di-
vision

No. 721-ND CIVIL

EARL A. ERNST,

Plaintiff,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G.
CLEMENS and H. G. McBRIDE Doing Busi-
ness as IDEAL MANUFACTURING COM-
PANY,

Defendants.

Honorable Leon R. Yankwich, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

ALAN FRANKLIN, ESQ.,
356 South Spring Street,
Los Angeles 13, California.

For the Defendants:

HUEBNER, BEEHLER, WORREL,
HERZIG & CALDWELL,

By HERBERT A. HUEBNER,
ESQ., and

RICHARD M. WORREL, ESQ.,
Brix Building, 1221 Fulton St.
Fresno, California. [*1]

March 8, 1949, 10:00 A.M.

Mr. Franklin: If Your Honor please, Mr. Earl Moore appears of counsel in the case, and he wishes to withdraw as counsel. He is going to testify as an expert.

The Court: All right. Make your opening statement.

Opening Statement on Behalf of the Plaintiff
By Mr. Franklin:

This is a suit for infringement of two letters patent, one to Mr. F. Ernst, No. 2,288,159, issued on June 30, 1942, for Sacking Device; and the other to E. A. Ernst, Reissue No. 22,740, April 2, 1946, for Sack Jigger.

The machines covered by these patents are used for the purpose of sacking potatoes and like farm products; that is, putting them in sacks of 10 pounds, 25 pounds, and 100 pounds.

The patent to F. J. Ernst is directed particularly to a shearer——

The Court: Have you a copy of the patent to

* Page numbering appearing at top of page of original Reporter's Transcript.

make available to me?

Mr. Huebner: Yes, Your Honor. I was going to suggest, that we have not only on file as an exhibit, but a separate set for Your Honor's personal use, of the prior art pleaded in the answer.

The Court: Very well.

Mr. Franklin: Suppose I offer the two patents in [2 & 3] evidence. The patent to F. J. Ernst, No. 2,288,159, I offer in evidence as Plaintiff's Exhibit No. 1.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 1 in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 1 and was received in evidence.)

Mr. Franklin: By the way, these patents were introduced in the deposition taken at Los Angeles, and they will retain the same numbers.

The patent to E. A. Ernst, Reissue No. 22,740, I will offer in evidence as Plaintiff's Exhibit No. 2.

The Clerk: Is this admitted, Your Honor?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 2 and was received in evidence.)

The Court: Let me ask this question: The first patent, No. 2,288,159, has two claims, and the next patent, the reissue patent, has three. Do you rely on all claims in each?

Mr. Franklin: No, we are suing on claim 1 of each one.

The Court: I did not so gather from your complaint.

Mr. Franklin: No, it is not stated in the complaint.

The Court: That is why I asked the question.

Mr. Franklin: I am glad you ask that. In order that there will be no question about it, I think I had better offer [4] in evidence the original patent to E. A. Ernst, No. 2,347,474, April 25, 1944, a Sack Jigger. That was the original patent under which the reissue patent, No. 22,740, was reissued, and I offer this in evidence as Plaintiff's Exhibit 1-A, to tie in with Exhibit 1.

The Court: It may be received.

The Clerk: It will be 2-A, Mr. Franklin. Your reissue patent is Exhibit 2.

Mr. Franklin: Then it will be Exhibit 2-A.

The Clerk: Plaintiff's Exhibit 2-A.

(The document referred to was marked Plaintiff's Exhibit No. 2-A and was received in evidence.)

Mr. Franklin: The reissue patent to E. A. Ernst is 22,740.

The first patent to F. J. Ernst, No. 2,288,159, claim 1 on which the suit is brought, relates particularly to the baffle plate, or what is known as the shearer, and its function is to divert the potatoes, which are placed on the conveyers, into the bags,

which are filled with potatoes. These shearer plates are placed at the bag, and divert the potatoes into the bag, and when the bag is full, it moves to the next, and so on, until each bag is full.

The shearer is mounted so it will remain in position of its own inertia when the potatoes are stacked against it, yet it may be removed by the operator from one bag to the other. [5]

The next patent, to E. A. Ernst, is Reissue No. 22,740, and is a sack jigger. That machine has a jigger board, on which the sacks rest, and as the potatoes are directed from the conveyer belt into the bag, and rest on the jigger board, this jigger board is jiggled; it is reciprocated. It has a reciprocating movement lengthwise of the board, and, as this board is reciprocated or jiggled, it sort of agitates the potatoes in the bag sufficiently to cause them to settle, and to pack in the bag. This jigger board has cleats which extend transversely thereof and which form stations or positions on which the bags are located, so that they will be properly filled by the shearer plate which directs the potatoes from the conveyer into the tops of the bags.

Before the advent of this invention, the sacking of potatoes, putting them in sacks, was largely done by hand; and the plaintiff, E. A. Ernst, who had been a potato farmer up north, in Washington and Oregon, when he came down to California, he located in Bakersfield and the potato district around it. Bakersfield, I am informed, is the third largest

potato-farming area in the world. There he saw great need for the sacking of potatoes.

The method then used was entirely too slow. So he looked over the field, and there was no automatic machine for the sacking of potatoes. So he proceeded to produce this machine. His brother, F. J. Ernst, now deceased, was working [6] with him, and is the one who secured the patent, Exhibit No. 1. The other secured the other patent.

These machines were successful. They were the first successful potato-packing machines in the industry, and for that reason we contend this is a pioneer invention, and entitled to liberal treatment by the court.

As soon as these machines were built and operated, it created interest among the large potato growers, and the plaintiff, within a very short time, had sold 40 of these machines, and from that time on they have been continuously sold to the industry throughout the United States, and some have been sold in Canada, and these sales are still continuing, and it is the general practice, in the potato-farming industry at the present time, so there is a point there which will weigh in determining the validity of the patent.

These patents have been attacked by a number of patents of the prior art. Most of them were cited by the Patent Office. Others were cited, which were not cited by the Patent Office, and we will contend that they were not as close as those cited by the Patent Office, and for that reason they were not so pertinent as those that were cited.

In all of these patents that were cited, there was not one patent that was suitable for sacking potatoes. There is not a word in any one of the patents of the prior art that says that these machines can be used for sacking potatoes, and [7] in a sense these inventions were revolutionary in the potato-sacking art.

The Court: Does counsel want to make a statement.

Mr. Huebner: I don't think it is necessary. We say that the patents, far from being pioneer, are mere improvement patents in the art, and in that capacity they are not invalid and are not infringed. Those points will be developed as we proceed.

The Court: Put on your proof.

Mr. Franklin: Concerning the plaintiff's title to the patent to F. J. Ernst—I think that is Exhibit No. 1—No. 2,288,159, I have a certified copy of the letters of administration of the estate of Frederick J. Ernst, which appoints the plaintiff, Earl Ernst, as the administrator. F. J. Ernst, the owner of the patent, Exhibit 1, was a bachelor, and his mother and father took title, and I have the original assignment of the mother and father of their entire interest in the patent to the plaintiff, E. A. Ernst. I show this to counsel.

I will offer these papers in evidence, as Plaintiff's Exhibits 3 and 4. 3 is the Letters of Administration.

The Clerk: Are these admitted, Your Honor?

The Court: Yes.

The Clerk: Plaintiff's Exhibits 3 and 4 in evidence.

(The documents referred to were marked Plaintiff's Exhibits Nos. 3 and 4, respectively, and were received in evidence.) [8]

Mr. Huebner: Mr. Franklin, what is the date of your assignment?

Mr. Franklin: July 20, 1943.

I will offer in evidence plaintiff's interrogatories and the defendants' answers to plaintiff's interrogatories, as Plaintiff's Exhibits 5 and 6.

The Court: All right. I will order the duplicates of those, which were filed with the originals, to be taken from the file and used as the loose exhibits, and we may refer to them more readily. They will be so received.

The Clerk: Plaintiff's Exhibits 5 and 6.

(The documents referred to were marked Plaintiff's Exhibits Nos. 5 and 6, respectively, and were received in evidence.)

EARL A. ERNST

the plaintiff, called as a witness on his own behalf, first being duly sworn, testified as follows:

The Clerk: Will you state your name, please?

The Witness: Earl A. Ernst.

Direct Examination

By Mr. Franklin:

Q. Mr. Ernst, are you the plaintiff in this action? A. I am.

Q. What is your occupation?

(Testimony of Earl A. Ernst.)

A. I am a manufacturer of machinery.

Q. Machinery for what? [9]

A. For potatoes.

Q. For sacking potatoes?

A. Yes, for sacking potatoes.

Q. Did you manufacture the potato sack jigger, as shown in Reissue Patent No. 22,740?

A. I did.

Q. That is Exhibit No. 2. And the sacking device of F. J. Ernst, No. 2,288,159?

A. Yes, I did.

Q. Have you ever been in the business of farming potatoes?

A. I have, ever since I was just a boy of 13, I have been in potatoes.

Q. Where was that?

A. Yakima, Washington.

The Court: Yakima, that is in central Washington.

Q. (By Mr. Franklin): Were those large potato farms?

A. No; at that time, they were small.

Q. How were potatoes sacked up there?

A. In 1913, it was just a little table. In 1920 they made a conveyer belt table.

Q. In 1913, that was all by hand? A. Yes.

Q. In 1920?

A. It was by some powered machinery or crank; mostly [10] hand crank.

Q. I hand you a photograph, and ask you if you can identify it.

(Testimony of Earl A. Ernst.)

A. Yes, they were sacked this way. They filled by hand. The sack was filled, and they put an empty bag on, and reversed it. This is used today, but it is a small capacity machine. At the time they built the automatic jiggers—it is still in use, but it was a very slow device.

Q. Was that the only sacking machine at that time? A. Yes.

Q. You say the bags were filled by hand?

A. Yes.

Q. When one bag was filled——

A. You had to slide it over, and vice versa.

Q. When did you come to Bakersfield?

A. I came to Bakersfield in 1939.

Q. Was that device in use there at that time?

A. It was.

Q. Was it meeting the demand of potato sacking?

A. It was not. It was too slow. The farmers wanted to get a higher capacity of potatoes, 15 cars a day, and with the equipment they used at that time they were only getting around 10.

Mr. Franklin: I will offer this in evidence as Plaintiff's Exhibit No. 7. [11]

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 7 in evidence.

(The photograph referred to was marked Plaintiff's Exhibit No. 7 and was received in evidence.)

(Testimony of Earl A. Ernst.)

Q. (By Mr. Franklin): When you saw the situation showing the need for increasing the capacity for bagging potatoes, what did you do then?

A. I started making a capacity machine. I started in, trying to develop this machinery, that would do this particular job. I started in at work, and was experimenting by developing machinery, until I got what we felt was suitable.

Q. Then a patent was taken out on the machine?

A. Yes.

Q. I will show you this photograph, and ask you if you can identify this, please.

A. Yes, that was the machinery we had built—what we called the Ernst Automatic Jigger. This was the mechanism of it.

Q. Have you got a copy of this?

A. I have, over there, yes.

Mr. Huebner: Mr. Franklin, are you providing us with prints of these photographs?

Mr. Franklin: I think we have them.

The Witness: Yes, we have.

Mr. Franklin: I haven't the time to go into that now. [12]

I offer these photographs in evidence, as Plaintiff's Exhibits 8, 9, and 10.

The Court: They may be received.

The Clerk: Plaintiff's Exhibits 8, 9, and 10 in evidence.

(The photographs referred to were marked Plaintiff's Exhibits 8, 9, and 10, respectively, and were received in evidence.)

(Testimony of Earl A. Ernst.)

Q. (By Mr. Franklin): What was the capacity of the machine shown in the last exhibits, 8, 9, and 10?

A. The capacity of this machine was around about 500 to 600 sacks per hour, but you would have to have a very good man to do that.

Q. That was the maximum?

A. That was the maximum, yes.

Q. Were these machines put in operation immediately after you produced them? A. Yes.

Q. Was there any interest shown in the potato industry, by people engaged in that industry, when you produced these machines?

A. Yes, there was quite a bit of comment. They claimed it was one of the best items they had on the market for potatoes.

Q. Did you receive any orders for those machines?

A. We received them along in the neighborhood of 1940, which we sold and delivered. [13]

Q. The first year you produced your machine?

A. Correct.

Q. Have you been selling those machines——

A. Yes.

Q. ——continuously? A. Yes.

Q. Where?

A. All over the whole country, from Idaho, Canada, Washington, Arizona, Utah, and Colorado.

Q. The shearer plate, which is indicated as 52 in

(Testimony of Earl A. Ernst.)

the F. J. Ernst patent, Exhibit No. 1, will you state how that operates?

A. Well, we have a couple of rods going lengthwise of the belt, and a shearer plate mounted on the frame, and it works on a sleeve, and slides easily, with the pressure going against it, and holding the frame in place, and when you want to go to the next sack, you move it on the track.

Q. Have you that machine in court?

A. Yes.

Q. Will you come down and demonstrate it?

A. First, we hang the sacks under here (illustrating), with the sacks, the empties, hanging here, and this goes back and forth, and when the potatoes come, it hits them.

The Court: What does it operate with, electricity?

The Witness: No, by hand. [14]

The Court: By hand.

The Witness: They take the sack off there, and the sack drops off this way (illustrating).

The Court: It is not a mechanical process, it is manual?

The Witness: Yes, it is manual.

The Court: The only one I have seen is an egg sorter, that almost had intelligence, because it picked out the sizes, and was operated electrically, by the way.

Q. (By Mr. Franklin): When it is moved to a position, to that bag, does it stay in that position?

(Testimony of Earl A. Ernst.)

A. Yes.

Q. You can move it by hand freely?

A. Very freely. We grease some, and some we don't grease.

The Court: Does that sort the potatoes as to size?

The Witness: Just fills the bag.

The Court: We will not put that in for identification.

Q. (By Mr. Franklin): Now, in your patent, Reissue 22,749, Exhibit 2, what do the sacks rest upon?

A. Upon a jigger board—what we call a jigger board. It is two boards.

Q. It is a long board?

A. Yes, a long board.

Q. Does it have any way of positioning the bags on the board? [15]

A. Yes, cleats on the board, on the bottom, and the board moves back and forth. Otherwise, the sack would slide off, if we did not have the cleats on the bottom.

Q. Are those cleats indicated by the numeral 28?

A. Yes.

Q. And the purpose of the jigger board is what?

A. It is to settle the potatoes or commodity down, so the sack will become full.

Q. How is the jigger board jiggled?

A. It goes back and forth.

Q. Is it a straight horizontal motion?

(Testimony of Earl A. Ernst.)

A. Yes.

Q. Reciprocating?

A. Reciprocating motion, back and forth.

Q. Is that reciprocating motion of any importance? A. Yes.

Q. Suppose it was moved up and down vertically?

A. It wouldn't work nearly as good, with that type of sack. It would throw the sacks off, for one thing.

Q. Would a vertical motion be apt to throw the potatoes up, and bruise them?

A. It would have a tendency to do so.

Q. Have you tried other machines?

A. I have tried other machines, but none that work. I had a machine like a rocker, but it would not get the sacks [16] full.

Q. Does the reciprocating machine cause the potatoes to slip?

A. Yes; it would have to run fast enough, and hard enough, so it will move the potatoes.

Q. Do they slip down?

A. Yes, the potatoes have to move in the cavity.

Q. How do you produce the reciprocating motion of the jigger board?

A. It is a mechanical device attached to the board—the jigger board.

Q. Indicate the location of that on that patent. Have you a crank?

A. Yes. It is off the center some.

(Testimony of Earl A. Ernst.)

Q. That central portion is indicated right at the top?

A. Yes. Here is the crank. Here is where it attaches to the bottom of the jigger board.

Q. The patent says:

“The sacking device in the particular form illustrated comprises a central portion 1 and elongated side portions or extensions 2 and 3.”

Point out the extensions 2 and 3.

A. Yes. 2 is right here.

Q. Where is 3?

A. It is on the opposite side, right here [17]

Q. And reading from page 1, column 1, of the reissue patent, No. 22,740, beginning at line 48, and continuing:

“These side portions may be identical in construction and are identical in this form of invention, but need not necessarily be identical. One of the side portions may be omitted entirely.”

That is, side portions 2 and 3?

A. Yes, they may be omitted entirely.

Q. If they were omitted, they would omit then part of the jigger board?

A. Yes, it would be what we call a one-man jigger.

Q. Would the crank be in the center of the machine? A. No.

Q. Where would it be?

A. The crank, the upper end of the machine.

Q. If we took the remaining part away, and left section 3, would section 3 operate the same?

(Testimony of Earl A. Ernst.)

A. It would.

Q. Have you seen the defendants' machine?

A. I have.

Q. Have you seen a photograph of it?

A. Yes.

Q. Take one of these photographs that shows where the crank is connected to the jigger board—

Mr. Huebner: Just a moment. These photographs have not [18] been even marked for identification.

Q. (By Mr. Franklin): Have you seen the defendants' potato-sacking machine?

A. I have.

Q. Where did you see them?

A. In Kern County.

Q. What city? A. Around Shafter.

Q. Do you have any photographs of that machine? A. I do.

Q. Who made the photographs?

A. The photographs were taken in Bakersfield.

Q. What was the name?

A. The name was Cal Williams.

Q. The address?

A. Seventeenth Street, just about two blocks off of Chester. It is located at 1310. I may be off on that number, but it is in there close.

Q. Do you have prints of the photographs that were made? A. Yes.

Q. Do you have them here? A. I have.

Q. Do they correctly represent the machine that you saw there? A. Yes. [19]

(Testimony of Earl A. Ernst.)

Mr. Franklin: Is that sufficient identification?

The Court: Ask counsel.

Mr. Huebner: We haven't seen them. We might stipulate.

The Court: Go ahead, and hand them to counsel.

(The court here took a short recess.)

Mr. Franklin: It is stipulated that the five photographs may be offered in evidence, and three of them are attached together.

The Court: Give them one number.

Mr. Franklin: All right. Mark them Exhibit 11.

The Court: 11-A, -B, and -C.

The Clerk: Exhibits 11-A, -B, and -C. Are those admitted?

Mr. Huebner: We stipulate, your Honor, that these photographs illustrate one of the machines manufactured by the defendants.

The Court: All right.

The Clerk: In evidence.

(The photographs referred to were marked Plaintiff's Exhibits Nos. 11-A, 11-B, and 11-C, respectively, and were received in evidence.)

Mr. Franklin: I have two other photographs which I will offer in evidence. I think these are of another machine.

Mr. Huebner: We stipulate, your Honor, if Mr. Franklin wishes, that the two photographs that he has in his hand illustrate another machine manu-

(Testimony of Earl A. Ernst.)

factured by defendants, one of [20] the photographs which contains in the center of the photograph a vertical panel guard, being one portion of the machine, and the other photograph being another, entirely separate section of the same machine. Is that what you want?

Mr. Franklin: Yes.

Mr. Huebner: Have the photographs marked so that we will know which is which.

The Court: They will be Exhibits 12-A and -B.

Mr. Huebner: Which is going to be 12-A, the one I referred to first?

Mr. Franklin: This one.

Mr. Huebner: For the record, the one with the guard in the middle.

Mr. Franklin: Yes.

The Clerk: 12-A and 12-B.

(The photographs referred to were marked Plaintiff's Exhibits Nos. 12-A and 12-B, respectively, and received in evidence.)

Q. (By Mr. Franklin): I will hand you Exhibits 11-A, 11-B, and 11-C. Where is the crank connected to the jigger board on Exhibit 11-A?

A. That is in the center, on 11-A.

Q. What does Exhibit 11-B show?

A. The crank is at the center of the machine, or off center—I wouldn't know.

Q. That is 11-A? [21] A. Yes.

Q. 11-B. That doesn't show the crank, does it?

(Testimony of Earl A. Ernst.)

A. No, it does not.

Q. What does it show?

A. It shows the shear board, and the sack——

Q. The shearer? A. Yes.

Q. Does it show the conveyor belt?

A. Yes.

Q. 11-C—state what it shows.

A. It shows a connection from the pitman, at the center of the machine, attached to the jigger board at one end of the machine.

Q. Where is the jigger board shown?

A. It is shown at the end of the machine.

Q. On the end, or to the right?

A. The lower part of the bottom, on the left-hand, toward the picture.

Q. Point it out.

A. This board is hung on these straps, that go alongside of the machine.

Q. On the photograph 12-B, state where the crank is connected to the jigger board.

A. It is on the left-hand of the machine, and the jigger board is attached near to the end of the machine. [22]

Q. Does that show a crank there, or a pitman?

A. Yes.

Q. Where is the crank located?

A. It's to the front of the machine.

Q. Is it mounted on anything?

A. It is mounted on the framework.

Q. Is it a vertical or a horizontal member?

(Testimony of Earl A. Ernst.)

A. Horizontal, part ways. The crank is here, and the shaft there (indicating).

Q. What is this part right here?

A. It is an offset piece of iron, to move the jigger board back and forth.

Mr. Huebner: It is a crank, isn't it?

The Witness: Yes, it is a crank, attached to the jigger board.

Q. (By Mr. Franklin): Where is the pitman you speak of?

A. It is on the left of the machine.

Q. Is it connected? Is it connected by the crank?

A. Yes.

Q. Whereabouts? A. To the jigger board.

Q. What part of the jigger board, the end or middle?

A. I'd say it was practically about the middle of the jigger board.

Q. I show you Exhibit 12-A, and I will ask you if the [23] crank is shown there. A. It is.

Q. Is it shown connected to the jigger board?

A. Yes.

Q. What part of the jigger board?

A. At the end of the jigger board.

Q. State how that crank is operated.

A. The crank is powered by an electric motor—no, this crank is not. It is powered from the belt, at the end of the sack, and the belt driven down, attached to the crank, which is tied to the frame and connected to the jigger board.

(Testimony of Earl A. Ernst.)

Q. How do you get the power?

A. Off the traveling belt.

Q. How is it connected to the traveling belt conveyor?

A. What part?

Q. Yes.

A. The part that delivers the potatoes to the sack.

Q. Is that an endless belt conveyor?

A. Yes.

Q. Does it have rollers?

A. Yes.

Q. How do you take power from that belt?

A. By means of gears and sprocket.

Q. There is a sprocket connected—what is that, a conveyor? [24]

A. A conveyor. It is at the end of the drum, and is taken down the crankshaft and there connected to the offset shaft connected to the jigger board.

Q. The offset shaft—that shaft?

A. Yes.

Q. There is a sprocket to the drum?

A. Yes.

Q. From the drum to the conveyor?

A. Yes.

Q. What is the element whereby the power is driven from the sprocket, or conveyor to the crank sprocket?

A. It is to move the jigger board back and forth.

Q. Yes. You have got a conveyor, and from the conveyor you are going to operate a crank, that takes the mechanism down to the crank.

A. You have got a drum and a sprocket.

(Testimony of Earl A. Ernst.)

Q. Where is that?

A. It is going down by speed chain on the shaft.

Q. A chain goes over the sprocket?

A. A chain goes over the sprocket.

Q. We speak about your jigger board having a reciprocating motion, and you said you had experimented with other machines, and you did not find these machines satisfactory. What about vertical motion? Did you observe how that operated? [25]

A. Vertical motion is up and down. It has a tendency to bruise the potato, which is not very good for the market and to ship.

Q. Is the skin of a potato very thin?

A. Yes, it is very delicate.

Q. Is it easy to bruise? A. Yes.

Q. Do you find bruising of the potatoes with the reciprocating machine? A. No.

Q. What is the reason for that?

A. Instead of moving the potatoes up and down, it just slides them over, more or less, moving them back and forth.

Q. In the patent we have the crankshaft connected intermediate the ends of the jigger board. You find that is the best location for connecting the crank? A. No, I do not.

Q. If you connect the crank to the end of the jigger board, does that work as well as if you connect it intermediate its ends?

A. So far as the platform, it works just about the same, but you do not get the adjustment.

(Testimony of Earl A. Ernst.)

Q. That is, you found that by connecting intermediate to the ends of the jigger board you could get a greater vertical adjustment? [26]

A. No, less.

Q. If the crank is connected at the end of the jigger board—I think I will have to go over that again and ask you to state the advantages or disadvantages of connecting at the center of the jigger board intermediate of the ends, or at one end. What is the difference so far as the adjustment of the jigger board, or what is the advantage or disadvantage?

A. We find that we get a substantial range. You can raise the board any height you want to.

Q. In other words, a wider range on the vertical adjustment?

A. Yes, wider range on the vertical adjustment.

Q. The cleats, No. 28, on the jigger board, do you find that they are necessary? A. Yes.

Q. Why are they necessary?

A. They are located right underneath the sack handles, crosswise of the jigger board.

Q. They prevent the sack from sliding down the jigger board?

A. Yes, by holding the sack permanently on the jigger board cleats.

Mr. Franklin: That is all.

(Testimony of Earl A. Ernst.)

Cross-Examination

By Mr. Huebner:

Q. Mr. Ernst, you are the plaintiff in the case?

A. Yes.

Q. Do you contend that the Ideal machine, illustrated in the photographs, Exhibits 11-A, 11-B, and 11-C, infringe either one or both of the patents in suit? A. I do.

Q. Then we will clarify it. Do you contend that the machine here in these three photographs infringes claim 1 of the Ernst Patent No. 2,288,159?

A. May I see that patent?

Yes, I will say——

The Court: He is asking you, do you contend that it infringes?

A. Yes, I would say it is the shearing board.

Q. (By Mr. Huebner): That is not the question.

The Court: Just a moment. Here is the patent he is talking about. Here is claim 1. With that in front of you, repeat the question.

(Question read by the reporter.)

The Witness: Yes, I do.

Q. (By Mr. Huebner): Do you understand the construction of the Ideal machine shown in these three photographs, Exhibits 11-A, 11-B, and 11-C?

A. Yes, pretty well.

Q. You have seen the machine yourself?

A. Yes, I have seen the machine in operation.

(Testimony of Earl A. Ernst.)

Q. Where, in the Ideal machine, shown in Exhibits 11-A, 11-B, and 11-C, do you find a pair of spaced bars longitudinally of the belt and substantially the length thereof?

A. On 11-B he has a bar, but he uses the back end as a track to run his wheel on it. Instead of a bar, he uses flat iron.

Q. Do you find two bars in the defendants' machine? A. Yes.

Q. You do not find two bars? A. No.

Q. Where, in Exhibit 11-B, do you find any loose bars or any bar? A. Well——

Q. It is not there, is it?

A. No, but there is a loose sleeve.

The Court: Will you give us the answer?

The Witness: This bar acts as a sleeve; it has a bar, as well as a sleeve, and it still has to be moved up and down the track.

The Court: It is not done by a loose sleeve?

The Witness: No.

The Court: What do you think takes its place?

The Witness: The wheels would take its place.

Q. (By Mr. Huebner): By the wheels you mean the trolley wheels, showing two pairs in front, which are connected with a [29] latching mechanism? A. Yes.

Mr. Huebner: Mark those two wheels by "W" in the photograph.

The Court: That is Exhibit 12-A or -B?

Mr. Huebner: It is 11-B.

(Testimony of Earl A. Ernst.)

The Court: Then mark it——

The Witness: “W”.

Mr. Huebner: “W” for wheel.

Q. (By Mr. Huebner): You find, do you not, in the section with these wheels, or that trolley mechanism, a latch? A. Yes.

Q. Do you know what the purpose of the latch is?

A. Its purpose is to hold it steadily, while they are filling up the bag.

Q. Do you mean where the latch engages on the frame, to hold it stationary?

A. Yes, it is latched on the frame. I presume it would roll, and you would have to have some way to latch it.

Q. Or it would creep?

A. Yes. Possibly, it could be designed so it would not need a latch.

Q. So far as it is shown on this photograph, so far as your knowledge goes, it would have to have a latch, to operate?

A. I don't believe it would have to have a latch to [30] operate. You can put it on.

Q. You have seen the machine? A. Yes.

Q. You know these rollers are on there, and roll along easily, under the pressure of the hand?

A. Yes.

Q. If that did not have a latch, it would not roll along?

(Testimony of Earl A. Ernst.)

A. You could take the thing, and make it work both ways, so you would not need a latch.

Q. I am not talking about what you would do. You know it would creep without the latch?

A. Yes, it would creep without the latch.

Q. In the sleeve arrangement, in Patent No. 2,288,159, it will remain in position with the potatoes traveling on the belt, without any latch mechanism?

A. It would.

Q. Looking at Patent 2,288,159, and at the photographs 11-A, 11-B, and 11-C, you find a plate having a portion of its ends in the coupling means? Take your time, so that you will know what we are talking about, and see if you can identify such a part in the defendants' machine.

A. Are you speaking of the shear plate?

The Court: No, he is asking you where you find something like what is described in claim 1: a plate having a portion [31] of its ends in the coupling means, said coupling means forming an acute angle with the sleeve so that the plate is positioned obliquely across the belt for the purposes described.

The Witness: In Patent 2,288,159, the plate would be No. 52.

The Court: Show the equivalent of that. Show something like it, in the defendants' device.

The Witness: The shear plate is like it.

Q. (By Mr. Huebner): You mean that the shear plate in the defendants' machine, shown on

(Testimony of Earl A. Ernst.)

Exhibits 11-A, 11-B, and 11-C, is similar to the shear plate 52 in the Ernst Patent 2,288,159?

A. I do.

Q. Where in the defendants' machine do you find any attached coupling means to hold a plate? Let us assume that the plate is the shear plate, with that understanding, the question is, where do you find in the defendants' machine attached coupling means to hold the plate?

A. This line, that extends over here. These rollers are attached to the plate, and hung on this rod.

Q. That is your best answer?

A. If I have your question correct.

The Court: You are an inventor. As an inventor, he is asking you to point to the equivalent of your claim 1 in suit here, in the accused device—the defendants' machine which [32] is charged to infringe yours. You know enough about patent law. You have talked to your attorney. The thing that is infringed is not the structure, but it is the things in the patent which are claimed as being not within the prior art. You have said that one is not there; No. 2 is not there, unless the wheels take their place. Now, the question is, does the shear plate take the place of the coupling means?

The Witness: Yes, it takes the place of the coupling means, and travels back and forth to fill up the bags.

Q. (By Mr. Huebner): Isn't the coupling

(Testimony of Earl A. Ernst.)

means talked about in claim 1 of the patent a little tiny bracket down in the corner of the shear plate 52?

A. Yes.

Q. Then you do find in the defendants' machine, shown in Exhibits 11-A, -B, and -C, a similar element or part, do you?

The Court: On Figure 1 of that patent, where is the coupling?

Mr. Huebner: It does not show very well in Figure 1, but it does in Figure 3. You see in Figure 3 a cross-section, and the upper corners on plate 52 are recessed or cut out.

The Court: Yes.

Mr. Huebner: You can see it in the dotted lines.

The Court: Is it to the right of 52 or 56?

Mr. Huebner: It would be to the right of 56, if you [33] look at the left-hand drawing.

The Court: The dotted square has two little circles.

Mr. Huebner: Yes; it is attached to the coupling means, which attaches the loose sleeve to the plate.

The Witness: May I ask a question?

The Court: Go ahead.

The Witness: On Figure 2, the left-hand corner, it looks like that was the place where we held our rod stationary, if anything goes wrong with the plate.

The Court: He is talking of the coupling means of the plate.

(Testimony of Earl A. Ernst.)

Mr. Huebner: If you will look at reference numeral 54, which looks like a sleeve, and extending inwardly from the sleeve it looks like a bifurcated crack——

The Court: Go ahead.

Mr. Huebner: Let us refer, Mr. Ernst, to the machine illustrated on the photographs attached to your interrogatories. They were referred to in the interrogatories as Exhibits 1 and 2.

The Court: Interrogatories, or answers to the interrogatories?

Mr. Huebner: We do not have his answers.

The Court: Have you those exhibits you are talking about?

Mr. Huebner: Exhibits 1 and 2. [34]

Q. (By Mr. Huebner): Are you aware that there is some difference in the construction of the shear plate assembly shown in the interrogatory photographs, Exhibits 1 and 2, over the construction shown in Exhibits 11-A, 11-B, and 11-C?

A. Yes, so far as looks, there is a difference.

Q. What is the difference in the construction?

A. In construction, I have a clamp to connect the shear plate so it does not run back and forth. Also I run it on wheels.

Q. So far as you described it, it is largely the same as shown in Exhibits 11-A, -B, and -C?

A. Yes.

Q. Are you aware there are two overhead rods

(Testimony of Earl A. Ernst.)

shown in the machine as shown in the interrogatories?

A. This machine has a plate that can act as a rod—a plate, five or six inches in height.

Q. In the photographs 1 and 2, attached to the interrogatories, there is a rod which shows clearly in the foreground of the picture? A. Yes.

Q. There is a trolley there? A. Yes.

Q. And a latch? A. There is.

Q. There is a similar rod that appears in the foreground. [35] Were you aware of that?

A. Yes. It is hung on there some way.

Q. Don't you know that in the back part of the photograph, which would be the back part of the machine, there is another rod similar to the rod shown in the foreground? I am not trying to trap you. I want to get the facts in.

A. On mine, there are rollers on this plate here. It rolls on the plate.

Q. Do you contend that the make-up of the defendants' machine, in photographs 1 and 2 attached to plaintiff's interrogatories, is an infringement of claim 1 of the Ernst patent 22,740? A. Yes.

Q. In Exhibits 1 and 2, attached to the interrogatories, I want to know, first of all, where do you find a pair of spaced bars?

A. Here is the spaced bar here (indicating).

Q. You are pointing to the spaced bar in the foreground of the picture? A. Yes.

Q. Where is the other spaced bar that makes up the pair? A. Opposite.

(Testimony of Earl A. Ernst.)

Q. You are agreeing with me that there is a rod or bar which makes up the pair?

A. I assume there is. [36]

Q. Where is it? A. Here (indicating).

Q. You are identifying it as a rod, Mr. Ernst. Maybe your counsel will want to help you verify it. There is a second rod similar to the front rod in the machine.

The Court: I think it is sufficient for the witness to point out the elements that are similar to his, but you are going over the evidence of what the machine consists of. You are assuming facts.

Mr. Huebner: I think, your Honor, that is correct.

Q. (By Mr. Huebner): Now refer, Mr. Ernst, to the patent, Reissue 22,740. You are the applicant who obtained this patent? A. Yes.

Q. Was Frederick J. Ernst, who applied for the other patent in suit, a relative of yours?

A. Yes, my brother.

Q. He was your brother? A. Yes.

Q. Did you two men work together in developing the patent in suit?

A. We worked together on the patent.

Q. On which patent did you work together?

A. 2,288,159.

Q. What did you do in developing the device?

A. I worked along with him, and invested half of the money. We worked together, both of us.

Q. Did you contribute effort in the way of me-

(Testimony of Earl A. Ernst.)

chanical aid, or did you merely direct him by suggesting what would be done?

A. At that particular time, my brother was what you might say, what you would call the boss, but I was interested.

The Court: You don't claim any part of the invention?

The Witness: Yes, I do.

Q. (By Mr. Huebner): Referring to Exhibits 11-A, 11-B, and 11-C again, the photographs—first of all I will ask you, do you contend that the machine illustrated in those photographs infringes claim 1 of your Reissue Patent 22,740?

A. On Exhibit 3?

Q. No. Exhibits 11-A, 11-B, and 11-C.

A. Yes.

Q. You do contend that it is an infringement?

A. Yes.

Q. Where in the structure of this machine do you find a pitman adjacent the platform?

A. In this picture I am looking at, Exhibit 3, it is in the center of the machine.

Q. We are talking about Exhibits 11-A, 11-B, and 11-C. A. At the end of the platform.

Q. At the end of the platform? Where does that best [38] show, on which photograph, looking at the exhibit number in front of the photograph?

A. It is 11-C.

The Court: Where do you get the word "pitman"? It is not in the claim that I can see.

(Testimony of Earl A. Ernst.)

Mr. Huebner: In the middle of the claim of 22,740, line 32, which says: "said means including a pitman adjacent the platform."

Q. (By Mr. Huebner): Point out which of these parts you are talking about, in the photograph, is the pitman that you say is similar. Is it the U-bar that runs along the back of the machine, or is it the cross-bar at the end of the machine?

A. It's the bar that runs across the back of the machine. That is what we term our pitman.

Q. That is what you say corresponds to the patent of Ernst—a pitman adjacent the platform?

A. Yes, with mechanism to move it back and forth.

Q. Where do you find coupling means connecting the pitman with that platform?

A. It is attached to the platform.

Q. Is it the cross-bar at the near end of the machine, shown in the photograph? A. Yes.

Q. Where do you find a central open locus on the platform of this Ideal machine? [39]

A. The central open locus—the jigger board, or the pitman in the center of the machine, the jigger board moves right and left.

Q. Where is the central locus? A. 11-A.

Q. In 11-A do you find a rigid connection between the two platforms at their inner ends?

A. Yes, a long board.

Q. There is no jigger mechanism between, at the central locus? A. No.

(Testimony of Earl A. Ernst.)

Q. In this particular machine it is completely at the end of the machine?

A. Carried off the end of the machine.

Q. You don't find any element which might correspond to the connection of the means with the platform at the central locus? A. No.

Q. You don't find one?

A. No, but as the crank moves at the end of the jigger board, it is the same operation as if you had it at the open locus, as you call it.

Q. Referring to the photographs attached to plaintiff's interrogatories, Exhibit 3—Mr. Franklin has marked the two exhibits 3, but they are different photographs—— [40]

The Court: What are you talking about now?

Mr. Huebner: I am talking about the photographs, marked Exhibit 3.

The Court: Both are marked Exhibit 3?

Mr. Huebner: Both are marked Exhibit 3.

Q. (By Mr. Huebner): Have you got the photographs in front of you? A. Yes.

Q. Do you understand the operation of that machine? A. I think so.

Q. You know it is one of the forms of the defendants' machine? A. Yes.

Q. Do you contend that the two machines shown on the two photographs, Exhibit 3 attached to the interrogatories, infringe claim 1 of Reissue 22,740?

A. I do.

Q. You find in the structure illustrated in the photographs, Exhibit 3, two platforms.

(Testimony of Earl A. Ernst.)

A. Yes.

Q. Those platforms have their inner ends terminating in the center of the photograph, as shown?

A. Yes.

Q. Do you find in that some sort of a jigger mechanism? A. Yes. [41]

Q. Do you find a connection near the end of the platform on the left-hand side?

A. Yes, it is connected.

Q. Explain it to the court, how it is connected at the end of the platform.

A. By means of the bearing, and two separate rods, with a pivot to tie them together.

Q. Is the jigger mechanism also connected to the separate platform on the right-hand side?

A. It is connected to both.

Q. The jigger mechanism is connected to both platforms? A. Yes.

Q. Do you understand that there is a coupling mechanism on the right-hand side?

A. Yes, there is a coupling mechanism, as you call it.

Q. It would be pivotally connected to the crank at the end? The jigger mechanism would revolve in an orbit? A. Revolve in what?

Q. Revolve in an orbit. A. Yes.

Q. And in revolving it will carry the connections which run from it to the respective platforms, in an up and down movement?

(Testimony of Earl A. Ernst.)

A. No, it would run your platforms back and forth.

Q. You do that by rotating an electric crank?

A. Either a half or three-quarters, or whatever they would set it, it would move up and down that distance, yes.

Q. So the crank that connects the eccentric end of the platform will move up and down in this fashion (illustrating)?

A. Yes. That would move up more than a little amount.

Q. How much? A. I don't know.

Q. Several inches?

A. No, not over one inch, that would be the greatest. You can set that down as low as three-eighths. Also I have made them as low as one-half in up and down movement.

Q. In claim 1 of the reissue patent, and in the mechanism of the machine in the exhibit we have been talking about, you would find a pitman adjacent the platform? A. Yes.

Q. Where?

A. At the bottom of the machine, in the center.

Q. Which is the pitman?

A. The crank. I have always termed the pitman the crank.

Q. Where do you find, in the defendants' form of machine, a coupling means connecting the pitman with a portion of the platform?

A. These two straps.

(Testimony of Earl A. Ernst.)

Q. The coupling means in the defendants' device is the [43] same as the pitman, is that right?

A. No.

Q. What?

A. It is not the same as the pitman?

The Court: How do you interpret that?

The Witness: A pitman?

The Court: What is a pitman?

The Witness: A pitman is just a piece of shaft which is taken off of the crank shaft and attached to one end.

The Court: This contains both elements?

The Witness: Yes, they are both built together and attached to both ends at the same time.

The Court: This combines the two?

The Witness: This combines the two.

The Court: But they are not separate elements in that device?

The Witness: That is right.

Q. (By Mr. Huebner): Do you find in this form of defendants' machine a platform including an elongated surface with container stations from the ends thereof to a central open locus?

A. That is here, and this is the central open locus.

Q. There are two platforms in the defendants' machine?

A. There are two platforms attached together. It means the same thing. [44]

Q. It is your impression that this is the same

(Testimony of Earl A. Ernst.)

thing, one a central open locus and one a single platform, is that it? A. Yes.

Q. I ask you where you find a vibratory means in the defendants' form of device, having its connection with the platform at the central locus.

As long as you are hesitating, aren't there two connections, one on the inner end of the left-hand platform and one on the right-hand platform?

A. On Exhibit 3?

Q. Yes.

A. Yes, but they are still connected right together.

(Whereupon, a recess was taken until 2:00 o'clock p. m. of the same day.) [45]

March 8, 1949, 2:00 P. M.

EARL A. ERNST

resumed the stand as a witness on his own behalf and, having been previously duly sworn, testified further as follows:

Cross-Examination (Continued)

By Mr. Huebner:

Q. Mr. Ernst, will you refer to the photographs, Plaintiff's Exhibits 12-A and 12-B, please?

A. These photographs are 11-A and 11-B.

Q. I understand. Do you know that these two photographs illustrate different parts or sections of one Ideal machine?

(Testimony of Earl A. Ernst.)

A. Yes, two different parts.

Q. Refer again to the photograph, 12-A. Do you find there two jigger platforms connected by a bridge?

A. Yes, they are connected by a piece of iron or wood.

Q. And do you find a jigger mechanism connected at one end of the total assembly?

A. Yes.

Q. And that entire mechanism shakes or vibrates the entire platform connected with the bridge?

A. Yes.

Q. The other, that shows the platform?

A. Yes. [46]

Q. And the jigger mechanism connected to the platform? A. Yes.

Q. At what place?

A. Somewhere about the center of the machine.

Q. You don't find any central open locus on that part of the machine indicated as 12-B, do you?

A. In part of that. I would say anywhere would be the open locus.

Q. Then it would not matter, in your opinion, in comparing the machine with the patent, whether there are cleats on the platform or not?

A. Yes.

Q. There are cleats all the way along the platform in Exhibit 12-B? A. Yes, three cleats.

Q. That is intended to accommodate or space how many sacks? A. Three.

(Testimony of Earl A. Ernst.)

Q. Where is the central open locus you are talking about?

A. It is in between the frame of that machine along that platform.

Q. Whereabouts?

A. Somewhere around the center, I imagine.

Q. Do you contend that the structures and machinery illustrated in these two photographs, Exhibit 12-A and [47] Exhibit 12-B, infringe your Patent 2,288,159?

A. No, not on that, because we have no jigger board. We have the shear plate, which is an infringement.

Q. 2,288,159 is the shear plate patent?

A. Yes.

Q. You say you don't contend it infringes the shear plate patent? Point out on Exhibits 12-A and 12-B where there is a shear plate, the same as is found in your patent.

A. On Exhibit 12-A it does not show a shear board on this picture.

Q. Where is the shear plate located on Exhibit 12-B?

A. It moves across the belt but in a different manner.

Q. That is located adjacent to the upper surface of the belt? A. Yes.

Q. You say that corresponds to your shear plate 52 of the patent in suit?

A. Not this in particular. On 12-B, I consider

(Testimony of Earl A. Ernst.)

this part is the jigger board. This has been used for 20 years.

Q. Indicate what you say has been used for 20 years.

A. This piece of iron that travels back and forth over the belt.

Q. That is in Exhibit 12-B? A. Yes.

The Court: In all conveyer belts, where you are dealing [48] with small objects such as oranges and the like, there must be something to push them along.

The Witness: Yes. They have lots of stationary units for oranges.

The Court: In Reedley I have seen where they pack boxes, and the conveyer belt pushes the whole box in front of persons who examine it.

The Witness: Yes.

The Court: So, unless you have a stationary box for various objects, which remains stationary when the belt moves, you must have, when you are dealing with a single object, fruit or vegetables, something that will push them along the conveyer belt.

The Witness: Yes.

The Court: You don't contend that you have a patent which entitles you to claim any means that anyone uses for pushing potatoes or oranges along a platform like that, in order to get them into the sack, do you?

The Witness: Not as applied to this, anything that might be used to convey oranges into a box, or whatever you put the merchandise in; but in

(Testimony of Earl A. Ernst.)

this particular one the wide belt, 30 or 20 inches wide, drops it into a sack, and when it is full it works over onto the other sack.

The Court: Where is the novelty in that?

The Witness: There is no novelty. This apparatus is [49] slow. One man can take 150 sacks an hour off, and he works like the dickens, and on mine you can get 300 sacks.

The Court: This is an inferior machine?

The Witness: It is inferior to ours.

Q. (By Mr. Huebner): Do you contend the machine in Plaintiff's Exhibits 12-A and 12-B infringes your Reissue Patent 22,740?

A. On 12-A, the jigger board, yes, and the shearing board; and on 12-B, just the jigger board.

Q. You do contend that the jigger board in both these pictures, 12-A and 12-B, infringes your Reissue Patent 22,740? A. That's right.

Q. In 12-A where do you find a central open locus in this machine?

A. There is none on this particular machine. The jigger board is on the end.

Q. You don't find any connection of the pitman and the plate at the end of the central locus?

A. Not on the central locus. It is put on the end of what you would call a pitman, because this arm is attached to the offset shaft, which makes this go back and forth.

Q. Look at 12-B. You said a minute ago that the machine had a central open locus on this little

(Testimony of Earl A. Ernst.)

platform in 12-B. Do you still insist that is possible?

A. This pitman is mounted somewhere about the center [50] of the machine.

Q. Do you contend that the central open locus of claim 1 of your reissue patent, with a vibratory platform, that that central open locus is present in 12-B?

A. It doesn't make any difference whether you put it in the center or the end or where; it still does the same job.

Mr. Huebner: I would like to mark this for identification.

The Clerk: Refendants' Exhibit A for identification.

(The document referred to was marked Defendants' Exhibit A for identification.)

Mr. Huebner: And the second photograph——

The Clerk: Defendants' Exhibit A for identification.

(The document referred to was marked Defendants' Exhibit B for identification.)

Mr. Huebner: Mr. Franklin, we inadvertently don't have any extra copies, even for ourselves, but I will get them for you.

Mr. Franklin: What is it?

Mr. Huebner: It is an end view of the photograph, Exhibit A, and the third photograph——

The Clerk: Defendants' Exhibit C for identification.

(Testimony of Earl A. Ernst.)

(The document referred to was marked Defendants' Exhibit C for identification.)

Q. (By Mr. Huebner): Will you examine Exhibits A, B, [51] and C for identification and state whether you understand the construction and mode of operation of those machines shown therein?

A. I think so.

Q. Do you contend that the machine illustrated in these three photographs, Exhibits A, B, and C, infringe claim 1 of each of the patents in suit?

A. I do.

Mr. Huebner: I would like to mark for identification a new series of photographs.

The Clerk: Defendants' Exhibit D marked for identification.

(The photograph referred to was marked Defendants' Exhibit D for identification.)

Mr. Huebner: And the second in this series——

The Clerk: Defendants' Exhibit E marked for identification.

(The photograph referred to was marked Defendants' Exhibit E for identification.)

Q. (By Mr. Huebner): Examine Defendants' Exhibits D and E for identification and state, please, whether you see in this construction the mode of operation of the machine shown therein.

A. Yes.

Q. Do you contend that these machines, illus-

(Testimony of Earl A. Ernst.)

trated in [52] Exhibits D and E for identification, infringe claim 1 of each of the patents in suit?

A. This Exhibit D is more or less dismantled, so you can't tell how it was hooked up. There is no connection there at all.

Q. Assuming there was a vibrating connection at the end of the platform, with that supposition would you say it infringes? A. Yes.

Q. That is to say, it infringes claim 1 of both patents in suit? I want to clear that up with you, please. A. Yes.

Q. Now, Mr. Ernst, will you refer to Plaintiff's Exhibit 7, the photograph of the 1939 machine. You manufacture machines of that construction and operate them, do you?

A. Yes; a few years ago, when I was on the ranch, we had them built, yes.

Q. What was that built for?

A. To sack potatoes or onions.

Q. Does it have a jigger board? A. No.

Q. Or a shear plate?

A. It has this; I think it is a shear plate; if you want to call it a shear plate. It is a slow speed; not high [53] speed.

Q. Are machines of that construction being manufactured?

A. It is for people who want to run around 100 or 150 sacks an hour.

Q. You still build such machines and sell them?

A. Yes.

(Testimony of Earl A. Ernst.)

Q. I believe you testified that the machines, which are manufactured by yourself under the patent in suit, became very popular.

A. That is right.

Q. Do you recall when, with reference to the year 1939, you began to manufacture and sell the new mechanical machines?

A. November, 1939.

Q. When?

A. It was in 1942 when I started making my automatic jigger.

Q. When did you start making machines with the shear plate mounting, the construction shown on Patent 2,288,159?

A. On our Patent 2,288,159, when my brother built them, I believe it was in 1940. I am quite sure it was 1940.

Q. In the year 1940 you did manufacture and sell commercial machines of the pattern illustrated in your Patent 2,288,159?

A. In 1940?

Q. Yes. [54]

A. No, I don't believe we sold any of them until 1941.

Q. About what time in 1941?

A. I would say August or September.

Q. Of 1941? A. Yes.

Q. Did you have them on display prior to that time?

A. He had built this, made it in the warehouse.

(Testimony of Earl A. Ernst.)

We had no manufacturing plant. We were working in potato houses at that time.

Q. You were working in potato houses at that time?

A. Yes. We built the machine in the potato house. We did not have a manufacturing plant.

Q. When you manufactured the machine 2,288,159 in the potato plant, it was for the use of the people operating the plant?

A. We built it for our own use.

Q. You were operating the plant? A. Yes.

Q. I want to clear that up. When did you first begin to use the machine like Patent 2,288,159, made up in the potato packing house?

A. In the year 1941, I think it was. Whether we used it in 1940 or 1941, I don't recall. It was in 1940, possibly late.

Q. Possibly late in 1940? [55]

A. Yes, or early in 1941.

Q. I would like to clear up what you said about the vibration of the platform of the machine, of this later type. Was it on a shaft back and forth, horizontal or vertical, or a combination of both?

A. We found through experience, going back and forth. We did have it hung up on straps, and it goes very slowly. It would possibly move, but you couldn't see it.

Q. Do you mean that it was a motion up and down as well as lengthwise?

(Testimony of Earl A. Ernst.)

A. Slightly up and down.

Q. Are you acquainted with Mr. Darby Day?

A. Yes.

Q. Do you recognize him as present in court?

A. I do.

Q. Do you recall meeting him in the plant of the Ideal Manufacturing Company at Shafter, in the year 1946?

A. I have been over to the plant once or twice, and possibly have. I don't recall talking to Mr. Day.

Q. Fix the time as nearly as you can, when you have visited the Ideal Manufacturing plant at Shafter.

A. I have only been in the place two or three times, I believe?

Q. When were they?

A. We went over, I believe in the neighborhood of [56] about two years ago, because they wanted to sell the place out to us, and me and Mr. Stolz, the general manager, went out and looked the place over.

Q. When was that?

A. I believe about two years ago; possibly 1946. It was either late '46 or early '47.

Q. On the occasion of that visit was Mr. Day there? A. No, I don't believe so.

Q. Did you have a conversation with Mr. Day at that plant with regard to a machine which the Ideal Company was manufacturing, such conversation taking place about 1946?

A. I don't believe so. If I talked to Mr. Day, I

(Testimony of Earl A. Ernst.)

went to see what was going on. I don't believe I went and drilled Mr. Day, but I do remember going in there sometime right after they had started the Ideal Manufacturing place.

Q. Will you please look at Defendants' Exhibits D and E for identification? A. What?

Q. D and E. Do you recall seeing machines having that construction and mode of operation on one of your visits to the plant of the Ideal Manufacturing Company? A. No.

Q. Do you remember seeing any kind of machine at the Ideal Manufacturing Company's plant?

A. Yes, I have seen some of their machines, but I [57] don't recall any one type. I would say they put out a 10-pound bag machine.

Q. Do you remember discussing with Mr. Day where the Ideal Manufacturing Company was infringing any of your patents?

A. I don't believe I ever discussed anything with Mr. Day about the patents. I don't believe I ever discussed it.

Q. You are asked this specific question: In 1946, at the plant of the Ideal Manufacturing Company in Shafter, California, in a discussion with Mr. Darby Day, and having before you and him a machine of the construction and mode of operation of Plaintiff's Exhibit D for identification, did you not then and there inform Mr. Day that you did not consider such machine to be an infringement of any of your patents?

(Testimony of Earl A. Ernst.)

A. I don't believe I talked to Mr. Day one way or the other.

Mr. Franklin: I don't see the materiality of this question. I object to it as incompetent, irrelevant, and immaterial.

The Court: I will sustain the objection.

Mr. Huebner: May I make the comment that it goes to laches and equitable estoppel and admission against interest.

The Court: I don't think it goes to any admission against interest.

Mr. Huebner: I will conclude my cross-examination. [58]

The Court: No defense of laches or anything of the kind is pleaded, and they have to be pleaded.

Mr. Huebner: We have finished the cross-examination.

The Court: Any redirect?

Redirect Examination

By Mr. Franklin:

Q. In this photograph attached to the interrogatories, Exhibit No. 2, can you show where the shearer is connected to the trolley?

A. Yes, it is connected by an arm, curved and bolted on it. The shear plate is also bolted onto the wheels of the trolley.

Q. That is where it is connected?

A. It is a piece of scrap iron.

(Testimony of Earl A. Ernst.)

The Court: That is page 2 attached to the deposition?

Mr. Franklin: The interrogatories.

Q. (By Mr. Franklin): Now, in the movement of the jigger board, you have stated that it was a reciprocating movement and moves lengthwise of the machine. A. Yes.

Q. And being hung on links, there might be a slight movement, an arc swinging from the center, and a slight vertical movement? A. Yes.

Q. Can you see the jigger board moving horizontally [59] and longitudinally in the operation?

A. Yes, back and forth.

Q. Can you see that slight vertical movement?

A. No, it is so slight it cannot be noticed with your eye.

Mr. Franklin: I think that will be all.

(Witness excused.)

The Court: Call your next witness.

HENRY J. STOLZ

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Henry J. Stolz.

Direct Examination

By Mr. Franklin:

Q. What is your occupation?

(Testimony of Henry J. Stolz.)

A. I am general manager of the Ernst Manufacturing Company.

Q. Are you familiar with the defendants' machine? A. Yes, I am.

Q. The Ideal? A. Yes.

Q. Have you seen it in operation?

A. Yes, I have.

Q. Have you made any photographs of it? [60]

A. I have supervised the taking of pictures of various Ideal machines.

Q. I show you plaintiff's interrogatories, Exhibit 3. Did you supervise the taking of those photographs? A. Yes.

Q. Have you made any drawings of the defendants' machines? A. Yes, I have.

Q. I show you a blueprint and ask you if you can identify that. A. Yes.

Q. The upper figure, which is marked "Back view," that is a rear elevation?

A. That is a rear view; back view.

Q. The lower figure is what?

A. The lower figure is a top view of the bottom part of an Ideal sacker.

Q. Will you describe the construction? They are both the same, are they not?

A. Yes. They are, of course, of the same piece of equipment.

Mr. Huebner: May I suggest, if the witness is going to refer to the document, that it be marked before a comparison is made?

(Testimony of Henry J. Stolz.)

Mr. Franklin: What is the next number? [61]

The Clerk: 13.

Mr. Franklin: Plaintiff's 13.

The Clerk: Plaintiff's 13 marked for identification.

(The document referred to was marked Plaintiff's Exhibit No. 13 for identification.)

Q. (By Mr. Franklin): Does the drawing show an endless conveyer? A. Yes, it does.

Q. Does it show a jigger board?

A. Yes, it does.

Q. Where is the endless conveyer located?

A. The endless conveyer is shown in the back view, the belts are identified by the number 7.

Q. Does it show a jigger board?

A. Yes, it does. The jigger board is identified by the figures 3 and 4.

Q. In which figure?

A. In the top view of the bottom part.

Q. The top view? I see the figures 3 and 4 on the bottom view.

A. That is correct. The jigger board is shown on the top view and would be directly behind the driving arm.

Q. That jigger board, 3 and 4, is not shown in the back view? A. No. [62]

Q. It is shown in the top view?

A. Yes, it is.

Q. Is that jigger board reciprocated?

(Testimony of Henry J. Stolz.)

A. Yes, it is reciprocated back and forth, on a horizontal plane.

Q. And what produces the reciprocation? Indicate the part by letter if you can.

A. The sprocket, No. 9, is driven through a means of rollers and chain. The sprocket is noted at the end of the letter, No. 7.

Q. Is the chain shown?

A. The chain is shown, numbered 8.

Q. And the sprocket is No. 9?

A. The sprocket, No. 9, rotates and drives a cam and eccentric shown in figure No. 6. Also the eccentric drives figure No. 1, which can be called a pitman or drive arm, which moves the figure No. 2 back and forth, and the figure No. 2 being connected to the jigger board, 3 and 4, they move back and forth on a horizontal plane.

Q. And the pitman is connected to the part 2?

A. Yes, it is. It is connected to 2 on the swivel, which in turn is connected to the jigger board.

Q. What part is connected to the jigger board?

A. It is connected to the end of No. 3, the jigger board. [63]

Q. What is the part 10?

A. The part 10 is a short piece of metal, which is more or less a bearing or a bracket, with supports on the end of part No. 2.

Q. Does part 2 swing on part 10?

A. Yes, one end of it swings on part 10, and the other end of part 2 swings on part 3.

(Testimony of Henry J. Stolz.)

Q. That is, part 3 is one section of the jigger board?
A. Correct.

Q. And are sections 3 and 4 of the jigger board connected?

A. They are connected together with the part 5.

Q. And the movement applied to the end of the jigger board 3 by 2, is that movement transmitted to the jigger board 4?
A. Yes, it is.

Q. Do the jigger boards move together simultaneously?
A. Yes.

Q. And then the movement of the jigger board is what, lengthwise?

A. The jigger boards are moved lengthwise with a very slight up and down action. This action can only possibly be the difference in the arc of the chains holding it. A 2-inch swing would be a maximum, or about one-eighth inch less.

Q. Do these jigger boards have cleats in them?

A. Yes, they do.

Q. What is the purpose of those?

A. The cleats position the bottom of the potato sack on the board and keep it from sliding on the board during the process of the shaking and jiggling action.

Q. Did you make any photographs in connection with this drawing?

A. Yes, I have pictures taken from the sketch and photographs.

Q. Do you have the photographs here?

A. Yes, they are in evidence.

(Testimony of Henry J. Stolz.)

Q. Can you pick them out from those photographs?

A. The sketch, Exhibit 13, is also shown on Exhibits 11-A and 11-C.

Q. Does it appear on 11-B?

A. 11-B is also the same machine, but it does not show this part of the machine shown on the blueprint.

Q. That blueprint shows the same parts as 11-A and 11-C?

A. Correct.

Q. How long have you been associated with Mr. Ernst in the potato business?

A. I have been with Mr. Ernst since February, 1946.

Q. Have you observed any of his experiments in building these machines? [65]

A. Yes, I have. I have worked with Mr. Ernst prior to 1946, as a representative in selling his material, and I have worked with Mr. Ernst since then.

Q. Were you present when he made any experiments with vertical movements, or horizontal and reciprocating movements?

A. No, I have not.

Mr. Franklin: That is all.

Cross-Examination

By Mr. Huebner:

Q. Was the Ernst Manufacturing Company, that

(Testimony of Henry J. Stolz.)

you say you are general manager for, a concern that was exploiting the subject-matter in suit?

A. We manufactured these two products, and many others.

(Witness excused.)

The Court: Call your next witness.

Mr. Franklin: We rest plaintiff's prima facie case.

The Court: Plaintiff rests.

Mr. Huebner: We offer in evidence, your Honor, a folder containing copies of the two patents in suit, as a matter of convenience, but primarily containing the prior art which has been pleaded in the answer, a duplicate of that folder having been handed to your Honor during the morning proceedings.

The Court: Admitted.

The Clerk: Defendants' Exhibit F.

(The folder referred to was marked Defendants' Exhibit F and was received in evidence.)

Mr. Huebner: I suppose, for identification purposes, that each patent may be given a different number?

The Court: Yes, if you want it done.

Mr. Huebner: If we can call it one exhibit, and give it a number.

The Court: Are you going to have the expert tell me what it is all about, or are you going to rely upon my knowledge what are the prior patents?

Mr. Huebner: We have no expert, but we have a practical man, a man who pretends not to be a patent expert.

The Court: What are your best references?

Mr. Huebner: I will tell your Honor what our best references are: No. 2,288,159: Cunningham, No. 873,991, and Helenbolt, No. 1,338,729. The others we are not advancing. Those are the patents which probably show the most.

As to the Reissue Patent No. 22,740, I refer as best references to Bradbury, No. 826,988 and Naeher, No. 1,719,124, which is not a file wrapper reference, and neither is Bradbury, and the third is Erickson, No. 2,043,739.

The Court: I think we will give them one number, and as you call my attention to them they can be marked, or as your expert goes through them we will give them a sub-number.

Mr. Huebner: We have a written stipulation, which has already been signed by the attorneys, that we may use uncertified copies of United States patents, and photostatic [67] copies of foreign patents, and also translations of the two foreign patents which are not numbered.

The Court: Very well. The stipulation may be filed.

Mr. Franklin: I would like to make one objection, and that is that all of these patents are on a different class of machines than the patents in suit.

The Court: That goes to the weight. I will overrule the objection.

Mr. Huebner: I offer in evidence a certified copy of the file wrapper patent, No. 2,288,159.

The Court: It may be received.

The Clerk: Defendants' Exhibit G in evidence.

(The document referred to was marked Defendants' Exhibit G and was received in evidence.)

Mr. Huebner: Our next exhibit is a certified copy of the file wrapper and contents of Patents No. 2,347,474.

The Court: It may be received.

The Clerk: Defendants' Exhibit H in evidence.

(The document referred to was marked Defendants' Exhibit H and was received in evidence.)

Mr. Huebner: I next offer in evidence a certified copy of the file wrapper and contents of Re-issue Patent No. 22,740.

The Court: It may be received.

The Clerk: Defendants' Exhibit I in evidence.

(The document referred to was marked Defendants' Exhibit I and was received in evidence.) [68]

(The court here took a short recess.)

H. G. McBRIDE

a witness called by and on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: H. G. McBride.

Direct Examination

By Mr. Huebner:

Q. Mr. McBride, are you the H. G. McBride named with A. G. Clemens in the complaint, doing business as Ideal Manufacturing Company?

A. I am.

Q. Does Mr. Clemens still hold an interest in this business? A. He does not.

Q. What occurred?

A. I bought him out the 1st of October, 1948.

Q. Are you now the sole proprietor of the business known as Ideal Manufacturing Company?

A. I am.

Q. Do you assume liability of the partnership as well as accept its assets? A. I do.

Mr. Huebner: That is all.

Mr. Franklin: No questions.

(Witness excused.) [69]

SPENCER DARBY DAY

a witness called by and on behalf of the defendants, having been first duly sworn, testified as follows:

The Clerk: What is your name?

The Witness: Spencer Darby Day.

Direct Examination

By Mr. Huebner:

Q. Mr. Day, you are at the present time salesman for the Ideal Manufacturing Company, a proprietorship conducted by Mr. McBride, are you?

A. Yes.

Q. How long have you been associated in that capacity with Mr. McBride?

A. Last December—it was a year ago, but I started in, and left, and this is since last December.

Q. Have you any personal knowledge of the equipment that Mr. McBride, and the organization known as Ideal Manufacturing Company, is manufacturing and selling?

A. Yes.

Q. What has been their principal line?

A. In building all types of products.

Q. The subject-matter here constitutes a portion of the equipment built by the defendant?

A. That is right.

Q. Can you very briefly testify as to the several forms [70] of machines which have been manufactured by Mr. McBride and his partnership?

(Testimony of Spencer Darby Day.)

A. Do you mean the machine——

Q. The machine in controversy. It has shear plates and a jigger board.

A. In 1946 we started to build the Biloff type of sacker. It has the eccentric on the center, and extends out to the end, and it shakes it, as illustrated in the photograph, with a hinged means, with a board on the end.

Q. What came after that?

A. We built a machine that had a center shaker, shaking from the center.

Q. There is a photograph in evidence of this. And what next?

A. Then came the type that was shaken from the end, or vibrated.

Q. Now examine Defendants' Exhibits D and E for identification, and state whether those photographs illustrate correctly the forms of defendants' machines that you have been talking about.

A. Yes, they do.

Q. Which ones?

A. This Exhibit D is what we call the Biloff type.

Q. What is Exhibit E?

A. Exhibit E is also the Biloff type, where it has [71] a rigid board with the hinged means separately, and the board shakes the sacks in this manner (illustrating).

Mr. Huebner: I offer the photographs heretofore offered only for identification.

(Testimony of Spencer Darby Day.)

The Court: They may be received.

The Clerk: Defendants' D and E in evidence.

(The photographs heretofore marked Defendants' Exhibits D and E for identification were received in evidence.)

Q. (By Mr. Huebner): Will you refer to the photographs which are annexed to plaintiff's interrogatories, the interrogatories being Plaintiff's Exhibit 5, and state which of the forms that you have referred to are illustrated in these photographs?

A. This is the shaker (indicating).

Q. Isn't that what you call the center shaker?

A. Yes.

Q. In that center shaker were there one or two rods for supporting the rollers that sustain the shearer plate? A. There were two.

Q. In that form? A. Yes.

Q. Referring now to the photographs marked for identification A, B, and C, state, please, whether those photographs illustrate any one of those three types of defendants' machines that you have identified. [72]

Exhibit A is the photograph of one of defendants' machines? A. Yes.

Q. That is shown as Exhibit A, and was modified, was it not, from the one which had been a center shaker? A. That's right, yes.

Q. This end view, which is Exhibit B for identification, which machine is that?

(Testimony of Spencer Darby Day.)

A. This is actually a photograph of the Sill machine.

Q. What I want to know is, which one of the Ideal machine forms is that?

A. This is a shaker form.

Q. Similar to Exhibit A?

A. Yes, the same principle.

Q. And what is Exhibit C?

A. This also has a shaker.

Q. Is that one of your newer models?

A. Yes.

Q. And is the end shaker type?

A. Yes.

Mr. Huebner: I would like to offer A, B, and C in evidence, which were marked first for identification.

The Court: They may be received.

The Clerk: A, B, and C in evidence.

(The photographs heretofore marked Defendants' Exhibits A, B, and C for identification were received in evidence.) [73]

Q. (By Mr. Huebner): Exhibit A shows a modified form of a machine previously made, of what is called a center shaker, the center shaker being identified in the photographs in the interrogatories. With that distinction, when was such change made in the construction of the machine?

A. Do I have the right one?

Q. The one in this picture attached to the in-

(Testimony of Spencer Darby Day.)

terrogatories is what you call a center shaker, and the picture, Exhibit A, is what is called an end shaker. When was the change made from the center shaker?

A. It must have been in March of 1948.

Q. What was the reason for making the change?

A. We got a letter from Mr. Moore——

Q. Earl Moore?

A. Earl Moore, saying with respect to infringing, that his advice was that we were infringing.

Q. How soon after you contacted him did you get his advice? A. Just a few days.

Q. In reporting to you, did he go on the basis of having made a search and having inspected the patents?

A. I think just by looking at the machine. I don't just exactly remember.

Q. Have you ever operated any of the machines in the condition that they were according to the photographs in the [74] interrogatories?

A. Not to my knowledge, whatsoever.

Q. Had some of them been placed with customers? A. Yes.

Q. Did your customers object to the change-over? A. No.

Q. Have any of your machines been operated by your customers since the change-over?

A. They have.

Q. By the way, did you ever have anything to do with a movable shearer prior to 1940?

(Testimony of Spencer Darby Day.)

A. I think in 1937, in the Paramount machine of the Paramount Manufacturing Company in Stockton, they had the same principle.

Q. What were the circumstances under which you—I mean your predecessor in business,—discontinued the Biloff and changed over to yours?

A. We had permission to do that, from his company.

Q. You paid them a royalty? A. Yes.

Q. Why did you discontinue?

A. Mr. Clemens, in taking over the shop, made a working model of the shearer, with the change-over.

Q. On what basis did you pay that royalty to Mr. Biloff—on the theory that he had a patent of that kind? [75] A. Yes.

Q. And you dropped it? A. Yes.

Q. In connection with the change-over?

A. With the Ideal machine.

Q. Did you make a change in the shearer support and means mechanically?

A. Yes; we changed over to the two rods. We thought maybe it infringed.

Q. There are two rods shown in the photograph attached to the interrogatories? A. Yes.

Q. And only one rod in the photograph attached as Exhibit A? A. Yes.

Q. It has a roller attached to the frame?

A. That's right.

Q. What kind of frame is the supporting mech-

(Testimony of Spencer Darby Day.)

anism shown in Exhibit D, which is one of the views of the Biloff machine?

A. This shear plate runs on a piece of angle iron, and has a pair of roller skates on each angle iron.

Q. You made that change-over on the advice of Mr. Worrell, your patent counsel?

A. Yes. [76]

Q. Very shortly after your first consultation with him, did he advise you whether in his opinion the defendant or his predecessors were infringing the patents in suit?

A. I don't remember.

Q. You don't remember?

A. No, sir, I don't.

Mr. Huebner: We have no further questions.

The Court: All right. Cross-examine.

Cross-Examination

By Mr. Franklin:

Q. In Defendants' Exhibit D is there a jigger board there? A. Yes, sir.

Q. Is there a crank connected to that jigger board to reciprocate it?

A. I think this is worked—this particular machine, I think, runs through an arm; it is connected on at the end, it comes out there at one end.

Q. One end? A. Of the jigger board.

Q. What is inside of the box that has the words "Ideal, Shafter"?

(Testimony of Spencer Darby Day.)

A. The regular sprockets and chain. That is exactly the same as we use right now.

Q. How is the crank driven at the end of the jigger [77] board?

A. I don't think there is a crank. It works off of the center. There is a rod hung on the back and connected on this.

Q. There is a rod that comes from the center mechanism to the end of the machine and connects to the jigger board?

A. To the best of my knowledge.

Q. On Exhibit E, how is that jigger board operated?

A. This is a Biloff type jigger, and it is run by a shaft coming from the motor straight down. There are two sprockets here, and this jigger board is rigid. It does not move backwards and forwards. It is stationary.

Q. What are you speaking about?

A. This board is rigid; and there are shaped in a form like this, to hold the sacks. This in turn moves.

Q. What holds the sacks?

A. This is stationary, but this has another plate connected with the center, and connects onto the board itself. I think it is in Shafter now.

Q. Do the bags rest on this, would you say, in this machine?

A. It rests, in this manner. It shakes the sacks in this manner (illustrating).

(Testimony of Spencer Darby Day.)

Q. It shakes from here?

A. Yes, out to the center. Biloff used the principle, [78] first of all, and I think he thought he might be infringing on Mr. Ernst, and he changed that, but I am not sure; I don't know what the reason was.

Q. Did you work for the Ideal from August 1, 1947, to October 15, 1947?

A. For the Ideal Manufacturing Company?

Q. Yes.

A. I hardly think so. I left—I would have to count up and see. No, I think I worked for Paramount after I left Ideal in June or July, and then I left them, to go to work for Mr. Ernst.

Q. When did you go to work for Mr. Ernst?

A. I believe in July.

Q. What year?

A. I will have to find out. It was 1948 or '47. I really don't know.

Q. Can't you remember whether it was '47 or '48? You don't remember?

A. I really don't. I couldn't tell exactly the date. I worked for him maybe two months or so—I don't remember; then I went back East.

Q. After you worked for Mr. Ernst, you went to work for Ideal?

A. I came back in December.

Q. In December, 1947 or 1948? [79]

A. It was in 1947 that I went to work for Ideal.

(Testimony of Spencer Darby Day.)

Q. Did you work for Ernst from August of 1947 to October, 1947?

A. I think that is right.

Q. Then you went to work for Ideal in 1947?

A. Sometime in 1947.

Q. And you are still there? A. I am.

Q. You worked continuously?

A. No; I went back in the summer. I moved back to the eastern states, and then I went back and worked for Mr. McBride again.

Q. You worked as salesman? A. Yes.

Q. For the Ideal?

A. Yes, at different times.

Q. Do you know whether the Ideal makes different types of machines?

A. As a general rule they build what the customer orders. However, we do have a standard machine.

Q. It is mostly a potato machine?

A. We have a complete machine for potatoes, carrots, and so forth.

Q. A general machine, for handling potatoes?

A. Yes. [80]

Q. Is this machine, shown in Exhibit 3 of the interrogatories, operated at the center, by hand crank? Wasn't that machine operated at Santa Maria?

A. Not to my knowledge, because every one of these machines was changed, so far as I know, before it was ever operated.

(Testimony of Spencer Darby Day.)

Q. Did you sell that machine to a concern down in Santa Maria?

A. I don't think this is the Santa Maria machine. This looks like the McCredy machine.

Q. I am speaking of this type of machine.

A. Yes, we did.

Q. You sold that machine? A. Yes.

Q. You sold that machine to other parties?

A. Yes. So far as I know, it was never operated on the same principle there.

Q. So far as you know? A. Yes.

Q. Were you ever a partner in the Ideal Company?

A. Yes, I was in 1946. I worked until some time in June, and went to work for the Paramount Company instead.

Q. You had an interest in the Paramount Company? A. Yes, at one time.

Q. When the crank was taken from the jigger board, and [81] connected to the end, was there any difference in the operation of the jigger board?

A. No; it helped it.

Mr. Huebner: In what way?

The Witness: There were several less moving parts, and less chain.

Q. (By Mr. Franklin): What about the vertical adjustment of the jigger board?

A. In ours they could adjust it to 50 or 100 pounds.

Mr. Franklin: That is all. [82]

March 8, 1949

J. WALKER GLENN

a witness called by and on behalf of the defendants,
having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: J. Walker Glenn.

Direct Examination

By Mr. Worrel:

Q. What is your name, Mr. Glenn?

A. J. Walker Glenn.

Q. Where do you reside?

A. 3015 Country Club Boulevard, Stockton.

Q. Are you familiar with the production, processing and sale of marketable products, such as fruit and vegetables? A. Yes.

Q. Have you ever been in the business yourself?

A. Yes, I started as a carload lot dealer in 1911.

Q. Did you treat the potatoes and vegetables in any manner whatsoever? A. Yes.

Q. Would you kindly tell the court your original manner of handling potatoes after they had been purchased?

A. There wasn't much handling in 1911, 1912 and 1913. It was merely a case of the farmers digging the potatoes, [83] and they were selected and graded in the field by individual pickers, and dumped in sacks, which were filled with a large mugg. The contract was for 150-pound bags.

Q. All of your processes were manual?

(Testimony of J. Walker Glenn.)

A. Yes.

Q. When did a mechanical machine for handling potatoes, to the best of your knowledge, occur?

A. That started, I would say, in the neighborhood of about 1915, to my knowledge. There were tables built, where we could dump the potatoes on the table, and push them along by hand and put them in the sack for re-sorting and re-grading.

Q. What was the function of this machine?

A. The original machine did not function. It was a sort of slanted box, which was pushed by hand. Later on it was a shaker box.

Q. Were those manually operated?

A. Yes, originally, and later on, with a crank, which rocked it backward and forward, with the idea of a pitman.

Q. Did you ever operate that yourself?

A. We used a hand machine.

Q. When did the method of jiggling potatoes mechanically first suggest itself to you to the best of your knowledge?

A. About 1927 or 1928. [84]

Q. Did you have anything to do with the development of this machine?

A. Yes, to the best of my knowledge, I believe my partner and I, who is now operating the Paramount Manufacturing Company, conceived the idea. We had a man by the name of Hood, and he worked

(Testimony of J. Walker Glenn.)

out the details, and built the first commercial machine, I think, that was used.

Q. Was this machine ever patented?

A. Yes.

Q. In whose name as inventor?

A. J. W. Glenn, and J. A. Swal.

Q. That is J. W. Glenn, yourself? A. Yes.

Q. Did the device you invented in 1928 employ a jiggling means for shaking sacks?

A. No, it did not. We had a sack holder, which we jiggled, and that was merely a sack holder, which was hung there, and which we jiggled.

Q. Where was the juggler used?

A. We used the juggler in Stockton, in about 1929.

Q. Was the machine ever used in Shafter?

A. Yes, I took the first potato jiggling machine to Shafter, and set it up, and operated it, in 1933. It had a table, and belt conveyor.

Q. Was the shearer movable? [85]

A. Yes, it had a movable shearer.

Q. Were the sacks movable relative to the shearer? A. Yes.

Q. In 1933, how did you settle the potatoes in the sacks? A. By hand.

Q. Why was a hand method employed, rather than a mechanical form of shearer?

A. It wouldn't have been practical. I don't think we could have used it, because we were using at that time an open mouth potato sack, and it took

(Testimony of J. Walker Glenn.)

a great deal of effort to close the potatoes in the bag. They were faced with potatoes across the top. That was the open mug type.

Q. Why was the open mug type used?

A. It was developed, when bags were not opened, and the object was for display purposes, and it made the potatoes look very nice. It was a standard bag. The bag was not filled to an even weight. Therefore they put in a large mug, and the customers did not want the open bags. They demanded the mug sacks, which apparently caused a condition in 1933 where it was impractical to use the mechanical jigger.

Q. Can you tell us where the jigger was practiced?

A. Yes. I can not say where it came into being, because at Shafter we were after more potatoes at a faster rate, [86] and therefore we got into the larger bag. As we got into the larger bag, the trade became more accustomed to it. As you saw today, the bag was closed at the top, so that there wouldn't be any likelihood of the potatoes being dropped out of the bag, and it losing weight.

Q. You stated that it was impractical to give a violent shaking to the bag by mechanical means. Will you state to the Court why the violent characteristic could not be done by a machine?

A. It could have been done, but the potatoes would have been beaten to death. No one ever

(Testimony of J. Walker Glenn.)

thought of using it that way. It would mash the potatoes.

Q. Was it apparent, when you got into the larger bag, that it would be desirable to use mechanical means?

A. Until I got out of the produce business, I never used or employed that method.

Q. When did you get out of the produce business that you went into in 1911?

A. About six years ago. I went into the real estate business.

Q. Were you engaged for a time in the production and sale of packing machines? A. Yes.

Q. Where? A. In Stockton. [87]

Q. Over what period?

A. That was after we got the patent, or shortly after. We leased the machines for some time, and did not sell them. That was about 1928. I don't recall the exact year. I think it was, in 1933, if I am correct—that was the year I went to Shafter, and not until 1934 did we sell any machines. We leased some in Shafter, and also sold a machine or two directly.

Q. Since your present occupation, which I believe you said was real estate agent—

A. That's right.

Q. Have you kept yourself currently informed on the development of this machine?

A. Yes, more or less. I was for some time interested in the machine, and spent many hours trying to get the bugs out of it.

(Testimony of J. Walker Glenn.)

Q. Is that a part of your business at the present time, keeping yourself informed?

A. Yes, naturally whenever I see one in operation, I stop and look at it. The Paramount has quite a few in the Delta section. Potatoes are grown around the Stockton area, and I stop in and look at the machine.

Q. For how long a period do you consider that you kept yourself thoroughly informed in the potato handling business, from the time of harvest to shipment? [88]

A. I might put it this way: During the time I was directly connected with the produce business I was constantly in contact with the packing method, and machines. Since I have been in the real estate business, I run over occasionally, as I have said, down to the islands. Just like when I was in Paramount, I talked to the operator, whom I have known for a long time, and spoke of the various changes as time went on.

Q. Is your experience in the field of potato handling, a practical one?

A. I set up the machine myself—the one in Shafter I set up myself. No one had known about it during the development; and I set up the machine myself.

Q. Are you an expert on patents? A. No.

Q. Are you a mechanical expert?

A. I am not an expert, but I can get by.

Q. Do you consider yourself qualified, from a

(Testimony of J. Walker Glenn.)

practical standpoint, as to what has been done in the present art and what changes have been made in the prior art?

A. I don't see why I cannot. We went at the job to get our own patent, and we went through a case very similar to this, in which we fortunately came out on top.

Q. Did that case involve sack jiggling?

A. No. It did not involve sack jiggling, just a [89] jigger.

Q. I would like to call your attention to Exhibit F, to the patent contained in Exhibit F, and with reference to the prior art—I wish to minimize our time in this matter, and I will ask you to turn to Patent 2,288,159, to Ernst, which is Plaintiff's Exhibit 1.

A. Yes.

Q. Briefly and succinctly can you explain the structure there in question?

A. There are two conveyor belts, one on each side, No. 18, I believe is the number for the belt. There are two rods running parallel with the belt, and presumably, according to the drawing, at the outer edge of each belt, there are sleeves that fit on a rod. There are two sleeves, one on each rod; a shear plate or deflector that is fastened to the sleeve by means of a link or pin, and bolted on here to the plate, and that plate can be forced to one end or the other of the belt.

Q. Is there any latch, for latching them in juxtaposition on the rod?

(Testimony of J. Walker Glenn.)

A. No. I have looked it over, and I don't see any on here, or described in the writing.

Q. How does the shear plate resist the movement of the potatoes against it?

A. I must say I have wondered about that myself, but [90] having it explained here today, I would say the theory is the potatoes hitting the shear plate, it throws the potatoes in the bin.

Q. As a man fairly familiar with that type of machine, in your opinion, could a binding effect be achieved by substituting rollers for the sleeves?

A. I would not think they could bind, if they were properly put on, and would roll more freely than with a sleeve and rod.

Q. Is your answer then, as long as the wheels were rotably mounted, there would be no binding effect.

A. There should not be.

Q. I direct your attention to Exhibit No. 2, the Ernst patent No. 22,740, and this patent primarily relates to the jigger platform. Will you very briefly describe how the platform operates.

A. There is the platform, No. 2, according to the drawing, with a link 23, attached to the platform. The link, I should say, is attached with a pitman. The upper side is attached to a bracket Nos. 27 and 24. There are four in the length of it. It does not show the cross section, but there are apparently four, on the other side, so the board will swing inside of the bracket.

(Testimony of J. Walker Glenn.)

Q. Is there any elevation movement of the platform, which is referred to as No. 20? [91]

A. There is an eccentric or an offset crank, whichever you might wish to call it, to which is connected the pitman, and the pitman connects from this crank to the bracket No. 60, I would say, or 62. There are two numbers. That is bolted down to the board, and when the crank is turned, by means of a series of connections, it causes the board to oscillate back and forth. In connection with that is the raising and lowering action of the board, which would be in conjunction with the movement of the board.

Q. Is the board moved? A. Yes.

Q. It is also horizontal? A. Yes.

Q. Will you describe the movement? In your opinion, as a man thoroughly familiar with the art, which is more important, the horizontal or the vertical movement?

A. The mere word "jigging" would imply to me that it was an up and down motion.

Q. I don't think my question is clear. Based upon your prior experience, which means is more important?

A. We always used the jigging motion, up and down.

Q. Why do you consider it more important than the horizontal?

A. It was necessary with a smaller bag. However, with new potatoes, the less friction you can

(Testimony of J. Walker Glenn.)

apply to the [92] potatoes, the less skin is removed from the potatoes. If the potatoes are moved in a manner to get less friction with each other, they will get less skinning, than if you set them down in the bag.

Q. Have you a copy of Defendants' F before you—a collection of patents?

A. There are some pictures here.

(An adjournment was here taken until 10:00 o'clock in the morning of Wednesday, March 9, 1949.) [93]

March 9, 1949, 10:00 A.M.

J. WALKER GLENN

having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Worrel:

Q. The first group of patents we propose to consider are those we consider relevant to the first Ernst Patent No. 2,288,159, which is Exhibit 1. In that connection I would like to call attention to the patent to Blank, No. 805,625. Have you had an opportunity to study this patent carefully?

A. Reasonably carefully.

Q. Briefly, what do you consider significant in the structure shown in the patent?

(Testimony of J. Walker Glenn.)

A. I believe a conveyor belt, a shear plate and plow, as referred to in the patent, for the purpose of deflecting the article passing along the belt, in this instance, on either side, or both sides simultaneously.

Q. Where is the plow 11 in the Blank patent mounted?

A. The plow 11 is mounted on a chain, which chain moves in the opposite direction of the belt, moving the plow along in the opposite direction.

Q. How many chains are employed?

A. There are two chains shown here, 10, I think it is. [94]

Q. Considering the Blank structure with the structure shown by Ernst in Plaintiff's Exhibit 1, what does the Ernst device employ in place of the plow 11?

A. It employs a shear plate, as termed in his patent.

Q. Do you consider the shear plate and plow equivalent?

A. Yes, they are both doing the same work. One is termed plow and the other is a shear plate.

Q. As a man experienced in the art, if you were to take the Blank structure, for the purpose of diverting crackers, what would you normally substitute for the plow 11?

A. I would use the shearer, as it is termed.

Q. Do you find anything in the Blank patent

(Testimony of J. Walker Glenn.)

that is comparable to the rods Ernst employs to mount his shearer plate?

A. The chains connected with the so-called plow are on either side of the belt, and run parallel to the belt.

Q. What commodity is the Blank device intended to handle?

A. This states here "cracker conveyor and distributor."

Q. Do you consider the handling of crackers, and their diversion, and having an endless conveyor, similar to the handling of potatoes? [95]

A. That endless conveyor will handle most any product that can be diverted off of the belt.

Q. In view of your experience in the field, if you had the Blank patent before you and adapted that for shearing potatoes on an endless conveyor, might that structure closely approximate the Ernst structure? A. It could, in my opinion.

Q. The second patent is that to Norkewitz, No. 860,936. That is a reference to Plaintiff's Exhibit No. 1. Will you point out very briefly any structure in that patent that you consider significant.

A. In this patent that you have just referred to, there are the shear plates—frankly, I built a machine very similar to this many years ago—where the products are taken off at intervals, with long extending arms, or plates or shears, to force the article off, in different positions.

Q. What is the Norkewitz device adapted to handle? A. It is a bottle-carrier.

(Testimony of J. Walker Glenn.)

Q. Would you consider the employment of the arms 33 and 34, to divert bottles, analogous or similar to the arms to divert potatoes?

A. Identically the same structure has been used on potatoes for a long time.

Q. For how long? [96]

A. I built a machine similar to that in 1929.

The Court: Are you still talking about the Blank patent?

Mr. Worrel: No. We are on the Norkewitz patent, the second of the two patents.

Q. Was this machine that you constructed in 1929, which employed shearer arms similar to 33 and 34, used publicly? A. Yes.

Q. The third patent, which we wish you to consider briefly, is the patent to Nielsen, No. 869,725, a package feeding machine, which patent was issued in 1907. This patent was a reference to the Ernst patent in suit. We can skip it and merely call the Court's attention to it. It was a reference cited by the patent office in both of the Ernst patents in suit.

The patent to Cunningham, issued in 1907, is one of those previously pointed out to be, I believe, quite significant. Mr. Glenn, would you briefly point out to the court any structure in the Cunningham patent, which is probably best shown in Fig. 1, which would be significant for your consideration.

A. You have two tracks, running parallel to the belt, which runs below a framework of the carrier. The shear plate is mounted on rollers—— [97]

(Testimony of J. Walker Glenn.)

The Court: What is the number?

A. Figure 1, Cunningham.

The Court: What do you designate as the shear plate?

A. The shear plate is No. 47 in Figure 2, which shows it a little more plainly in an oblique position, and up above the shear plate is shown as 47—the two figures 47 and 75 are shown and a dotted line.

Q. On what is the shear plate mounted, Mr. Glenn?

A. The shear plate is connected——

Q. Can you give the general structure. I don't mean in precise detail.

A. The shear plate is connected onto the carrier above, which is movable on tracks above. There is a wheel shown as No. 10.

Q. The carrier is supported on wheels 10?

A. Yes.

Q. Those wheels roll on track 9?

A. That is correct.

Q. What relationship do those tracks 9 bear to the endless conveyor 4?

A. They run parallel to the conveyor.

Q. What is the movement made with the shear plate 47, relative to the track? Does it run across the track, longitudinally, or what?

A. The shear plate runs longitudinally with the track.

Q. Is there a structure provided in Cunningham

(Testimony of J. Walker Glenn.)

for locking the carrier in place, to hold the shear plate in a downward location?

A. Yes. The specification in the patent shows that the wheel 60, and the shaft 59—the shaft is connected to a block or brake. That can be locked, I believe, to hold it in position. The plate is designated as 63.

Q. Do you find any sleeves in the Cunningham patent for mounting the shear plate?

A. It would appear that No. 46 is a bar, connected to the flange, which in turn is bolted to—according to this it looks like a bolt—bolted to the carrier, and the plate is fastened to the plank, which is shown in the lower figure on the same page.

Q. For what purpose is that mounting employed?

A. It is for the purpose of deflecting the product that passes over the belt, to the side.

Q. What effect does it have specifically on the shear plate?

A. The shear plate is held in position by this bar and rod.

Q. Is it an adjustable or a fixed position?

A. No, according to the specification it states that the shear plate may be moved and lowered. It may have [99] an adjustment, which changes the bar to an oblique position, or it might go straight, or at right angles more.

Mr. Worrel: The patent to Cowley, No. 1,225,586, was a patent office reference in Exhibit 1.

The Court: You are not skipping any?

(Testimony of J. Walker Glenn.)

Mr. Worrel: I am going to skip this. This is merely cited to show the shear plate.

Q. The patent to Helenbolt, No. 1,338,729, I deem quite significant, in consideration of the plaintiff's patent, Plaintiff's Exhibit No. 1. In the Helenbolt patent do you find a shear plate?

A. Yes.

Q. Can you find what the designating number is?

A. Fig. 4,28.

Q. That shows a shear plate mounted above an endless traveling belt?

A. Yes.

Q. What is the shear plate mounted on?

A. On a wire drawn tightly, and eyelets that are connected to the wire, with a tension, and another wire connected to the shear plate, in order to stop along the belt at any intervals named.

Q. Directing your attention to the wire 30, to which you refer, how many of those are employed to mount the shear plate? [100]

A. There are apparently two here.

Q. Do you want to check that answer.

A. The wire 30 here, and 30 there, on the opposite side. There must be two, one on each side. That is in figure 2. It shows 30, here, and 30 on the opposite side.

Q. What does the Ernst device employ in place of the wire 30?

A. It would use a rod or bar in place of the wire.

(Testimony of J. Walker Glenn.)

Q. As a mechanic in this field, do you consider there is a distinction between a rod and a wire?

A. A rod is a little heavier than a wire, whereas, if the wire is drawn taught, it can be used as a rod.

Q. Is the shear plate slideable on the wire 30?

A. Yes.

Q. Is there a means for locking it in place?

A. Yes, the shear plate is caused to move backward and forward above the belt, by a wire or cable No. 33.

Q. What type of material is the Helenbolt device adapted for or used in connection with?

A. I think it states apples and oranges. However, I have seen a machine quite similar to this used in the Salinas section many years ago, for apples.

Q. Is it suitable for use in the sacking of potatoes, or the diverting of potatoes, with an endless carrier?

A. That can be used. [101]

Q. Without any material alteration?

A. The only alteration is in substituting the sack holder for the bins at the side.

Q. The next patent to True, No. 1,369,502, is a reference. Mr. Glenn, directing your attention to Figure 7 of the True patent, what is the element represented at 36?

A. Will you repeat that, please?

(Question read by the reporter.)

A. That is a deflector or shear plate.

(Testimony of J. Walker Glenn.)

Q. Is it mounted above an endless traveling belt? A. That's right.

Q. How is it mounted?

A. On bars or rails, designated as No. 8.

Q. How is that connection of the shear plate to the rails effected?

A. It is fastened, according to the specification here, as I recall—it is fastened on brackets.

Q. Are those brackets movable?

A. I believe that it states that the brackets are placed at intervals, and are moved into different positions.

Mr. Worrel: The patent to Macbeth, is a patent which was discovered on search. We are not going to refer to it in specific detail.

The patent to McBride, No. 1,504,894, was cited by [102] the patent office, in connection with patent No. 2,288,159, and we probably can omit the same.

The patent to Carpenter, No. 1,532,228, is also a file wrapper reference in the patent to Ernst No. 2,288,159.

Mr. Glenn, would you direct your attention briefly to Fig. 3 of the patent to Carpenter? A. Yes.

Q. What is the element indicated at 6?

A. That is a shear plate.

Q. Is it mounted above an endless traveling carrier? A. That's right.

Q. Is it suitable for deflecting potatoes?

A. It can be used, yes, to deflect potatoes.

Q. The patent to Paisley, No. 1,818,427, is a

(Testimony of J. Walker Glenn.)

patent which was not considered by the patent office in the prosecution of any of the Ernst patents. What in this Paisley patent do you find similar, if anything, to the Ernst structure?

A. In Fig. 3 it shows the plow No. 30—I believe it is indicated as 30.

Q. I believe that is right.

A. Yes. I see another mention in Figure 1, 30.

Q. Is that plow, or shearer device mounted above an endless traveling belt?

A. Yes. [103]

Q. Is it mounted for a sliding movement longitudinally of the belt?

A. It is.

Q. How is that mounting effected?

A. There are rails on either side, and a plate, with the ends turned down to the outer side of the frame, the ends being No. 27. And upon the carrier passes a plow or deflector in a central point, so as to be able to give adjustment to the plow.

Q. What significance does that adjustment have, to move about the point 29?

A. The plow is directly pointed down the middle of the conveyor. That may be turned so as to have the point of the plow directed to either the left or right-hand side, whichever the case may require.

Q. In your opinion, is this suitable to use in the diverting of potatoes?

A. It could be.

Q. Would you consider it an analogous structure if you substituted a plate for the so-called plow?

A. Substantially it is a plate.

Q. Could that plate or plow be so positioned as

(Testimony of J. Walker Glenn.)

to divert materials to one side of the endless traveling belt? A. Definitely.

Q. The succeeding patent is a reference in the Ernst [104] patent relative to the shear plate—that to Vosler et al. To expedite the matter, we will not consider in detail, except to point to the fact that shear plate 48 is positioned longitudinally to the endless traveling belt.

Mr. Glenn, having considered and studied the patents carefully, and having studied the Ernst patents carefully, and in view of your knowledge of what has been done in the potato processing art, would you please tell the Court what contribution you feel Mr. Ernst has made to the art?

A. Frankly speaking, I don't see anything that is new. It is merely using the same type of arrangement we have just discussed.

Q. Do you find, from the patents we have recently discussed, any one patent that you feel shows the essentials of the Ernst structure?

A. There are two or three. The last one I went over, Figure 5, shows that clearly.

Q. By the last one you are referring to the patent to Vosler, et al.? A. Vosler, et al.

Q. In what particular do you feel that shows all the essentials of the Ernst device?

A. Figure 5 is the best example. You have a conveyor belt. You have an angularly constructed block, which [105] would serve the same as a shear plate. You have a roller on one side, to allow the

(Testimony of J. Walker Glenn.)

carrier to move, and you have a notched carrier on the other side to position it; and you have a cable with a handle to move it from one end to the other.

The Court: There is no sacking device?

A. No, I do not see it. Presumably in Figure 4, the table has various deflectors or shearers. These shear plates or blocks are allowed to move downward, and allow produce to come to the end of the table, if desired.

Q. This patent is cited as being relevant to a consideration of the Ernst patent which relates to a belt conveyor rather than a packing device.

The Court: The first device provides for sacking, but does not provide for shaking or jiggling, as it describes it. It will be the reissue patent especially which constitutes the jiggling movement which enables the potatoes to settle in all the sacks at the same time, so as to have a more solid pack.

Mr. Worrel: At this point we wish to refer to the prior art patents, that are of particular consideration in the jiggling and sacking, in Plaintiff's No. 2. The patent to Fuerste, No. 420,049, issued in 1890, was not cited by the patent office in the prosecution of any of the Ernst patents in question. Will you state to the court what [106] structures it is significant of?

A. You have a frame, on which rods are hung, which allows, as designated in the patent, the crate-head to swing as a pendulum, and at the opposite end, it is hung so the crate, as it is designated in the

(Testimony of J. Walker Glenn.)

patent drawing, may also swing back and forth as the pendulum.

Q. Specifically do you see anything in Fig. 1 of the Fuerste patent which is similar to the suspension links 23 of the Ernst patent?

A. Yes, the rods 11 and 12, would be used in the same method as the straps 23.

Q. You referred a moment ago to the crate-heads. Are the crate-heads and crate interconnected in the operation of the Fuerste device?

A. Yes, the crate-head and head are located together.

Q. Do you see any similarity in the movement permitted by this element, and the movement of the Ernst jigger board?

A. No, it is operated in the same manner.

Q. How is it different?

A. It is different, with the crank, the crank shaft D, with the connecting rod and can be turned as a pitman, connected to the crate-head and to the crank at opposite ends.

Q. Where is the pitman connected to the crate assembly? [107]

A. At the lower portion.

The Court: Indicated by the number——

A. 35, with a line.

Q. On what figure? A. Figure 1.

The Court: On the side?

A. On the left-hand side.

Q. (By Mr. Worrel): You meant the right-hand side?

(Testimony of J. Walker Glenn.)

A. The right-hand side. I beg your pardon.

Q. Is there a supporting platform employed in the Fuerste device?

A. The crate-head and crate, when taken together, would form a unit.

Q. What is the Fuerste device used for?

A. It is a churn.

Q. Would you consider the vibrating of the crates analogous to the vibrating of sacks in 4 of the jigger platform?

A. It gives the same action and result.

Q. As a mechanic in the field, would you have any difficulty in reconstructing or modifying the Fuerste device for sacking potatoes?

A. No; if I saw this machine I would merely place a board across the lower portion, substituting the crate-head and crank on which to fit the bag. The means would be [108] the same.

Q. The second patent relative to Plaintiff's Exhibit 2 is the patent to Buschman, No. 435,681, which was not cited by the patent office or considered, and which is perhaps significant as showing a pitman. We are not going to take up time with this. It relates to photographic equipment, but is provided as significant in designating the art and what has been done in a vibrating patent.

The Bates patent No. 643,102, obtained in 1890, is cited by the patent office in connection with the earlier of the two Ernst patents. Directing your

(Testimony of J. Walker Glenn.)

attention to Fig. 2, do you find in Fig. 2 a sack supporting platform?

A. Yes, that is designated as No. 23.

Q. Is that platform mounted for reciprocal elevational movement? A. Yes.

The Court: Which figure?

Mr. Worrel: Figure 2, your Honor. Is that platform 23 mounted for vertical movement only, or vertical and horizontal movement?

A. It is mounted for vertical movement.

Q. Is that platform mechanically jiggered?

A. Yes, it has a push rod No. 20, shown in Figure 1, and a plate at the top shown in Figure 2. The plate, No. 34, and rod, are moved upward and downward, by the use [109] of a gear at the bottom that raises and lowers the roller, which roller is connected to the push rod.

Q. Confining your answer to the structure shown in Fig. 2, in your opinion is that suitable for the sacking of potatoes?

A. It could be applied to the sacking of potatoes, if upward and downward motions were desired.

Q. Is the jiggling motion usually up and down?

A. As I stated yesterday, up and down is better than back and forth.

Q. We now come to the patent to Bradbury, No. 826,988, which was not considered by the patent office in connection with the Ernst patent. I refer you to Fig. 1 of the Bradbury patent. Will you

(Testimony of J. Walker Glenn.)

briefly describe to the court what portion of the structure you deem significant?

A. At the upper portion of the structure you will find No. 101. There are three numbers—not that one—on the right-hand side, and going directly to the left, to No. 71, is the portion to which I will refer.

The Court: Is that 1 or 2?

A. No. 1.

The Court: What is the element shown at 72?

A. 72 is designated as a screen.

Q. How is that screen mounted?

A. The screen is hung on the hinges designated No. 71. [110]

Q. Do you find any difference between the hinges 71 in the Bradbury patent and the hinge 73 of the Ernst construction?

A. No, I don't.

Q. Is the screen, as you call it, No. 72, jiggered?

A. The screen is jiggered, or caused to work backward and forward by being connected with the pitman, designated as 100, and this pitman is connected to the end of the pan and screen, which are tied together, and the other end of the pitman is tied to the crank No. 101, and driven by the sprocket off of the shaft 87.

Q. And what is this screen adapted to handle or operate?

A. This is for the harvester, and the screen is for the grain.

Q. In your opinion, is the use of the device for

(Testimony of J. Walker Glenn.)

shaking or jostling of grain analogous to the device for potatoes?

A. This structure, although a portion of the harvester, is identical with the old hand screen shaker, which I referred to yesterday.

Q. That was the hand shaker in the potato device? A. Yes, sir.

Q. When that structure was used in handling potatoes, was a screen employed at 72? [111]

A. That's right.

Q. In common practice, was anything ever done to that screen to alter its character?

A. Yes, we sometimes would cover the screen, particularly if we were sorting onions. It was also used for the purpose—if we were dealing with onions, we would cover the screen with burlap sack so as not to lose the small onions through the screen. We were endeavoring to take out small and spoiled onions. Those which were undesirable were picked out, and dropped into a side sack.

Q. With the screen 72 modified as you have described, would that, in your opinion, constitute a platform? A. Yes.

Q. Were the sacks ever supported on the platform for jigger purposes, and used as a potato machine, to which you referred?

A. No, they were merely dumped on one end.

Q. What modification would be necessary in the element 72 to make it identical to the Ernst platform?

(Testimony of J. Walker Glenn.)

A. If the screen or particular portion we are speaking of were substituted for the plank, then it would be the same thing as Mr. Ernst has.

Q. On Mr. Ernst's platform are cleats 28, which designate the stations. In your own experience have you ever used, or have you seen used, cleats to designate [112] potato sacking stations?

A. Yes.

Q. When were such cleats first used?

A. We used cleats, designated in Mr. Ernst's patent as No. 28—we used them in the old days. The potatoes were dropped in the bag, and the cleats were nailed to the floor.

Q. From your knowledge of what has been done in the potato field, and the specific structures which you have told us about, which have been used in the potato field, what new has Mr. Ernst brought into the field by his patent No. 22,740?

A. I would say frankly nothing new. The action would be the same.

Q. We don't want to belabor the point. But in your opinion are most people involved in the construction and use of potato handling equipment familiar with what has been done in the harvester field?

A. I would imagine they would be. The harvesting of potatoes is generally done in and about the same place as grain is raised.

Q. The next patent to Mr. Keeran, No. 893,516,

(Testimony of J. Walker Glenn.)

was cited by the Patent Office and illustrates a form of sack jiggling mechanism.

The Broussard patent, No. 1,014,444, was not found by [113] the Patent Office, or considered in the prosecution of the Ernst patents. Referring to Figure 1 of the first of the Broussard patents, can you tell us briefly the purpose of the machine, Mr. Glenn?

A. The purpose of the machine is to rock the frames, shown on either side, on which frame is held a hand truck and on the hand truck is supported a sack.

Q. You refer to a frame. For the purpose of clarity identify it by number.

A. It is Cage No. 26, I believe.

Q. How many of those are found in the Broussard device? A. Two.

Q. Are they spaced? A. That's right.

Q. Are they supported?

A. Yes, they are supported at the top.

Q. The Ernst patent refers to an open central locus. Do you find any open central locus in this device?

A. You have the central portion, where the crank 65 is shown by the dotted lines on the figure. The pitman, 65, and the post or bar 63, are supported by two members, 61 and 62.

Q. Will you briefly describe the effect of the bar 63 on the sack holding platform, when 65 is motivated. [114]

(Testimony of J. Walker Glenn.)

A. The bar 62 moves upward, forward, and longitudinally, and causes the agitation or swinging motion of the part designated as 26.

Q. Would you consider that a major distinction between this patent and this of Ernst?

A. Yes, because the bars are connected to the base of the shaking device.

Q. Passing to Broussard's second patent No. 1,025,781, in Figure 2, there is a distinction pointed out from that in the first patent? A. Yes.

Q. How has it been accomplished?

A. The bar referred to in the first patent, which is designated as 3, has been substituted for the bar designated as 37, and a turned down portion of the bar No. 38. This portion of the bar 38 is connected to a plate or a bearing, and is bolted or fastened to the platform, and No. 38 projects through the plate or bearing, tying them together.

Q. How many platforms are shown in Broussard, No. 2? A. Two.

Q. Is there an open central locus? A. Yes.

Q. Are the platforms jiggered by the use of a pitman? A. Yes.

Q. Where is that connected? [115]

A. The pitman is connected to the bar 33, which in turn is connected to the bar 37, and that portion of the bar 37 designated as 38 is connected to the platform.

(Testimony of J. Walker Glenn.)

Q. What relationship does the bar 37 have to the open central locus?

A. It is at the open central locus.

Q. Is pitman 32 connected to the platforms at the open central locus? A. That is right.

Q. The patent to Stehlin, No. 1,191,243, is also significant, but only in certain specific details. In Fig. 2 do you find a bag supporting platform?

A. Yes. In this particular instance the bag is hung from the framework connected to the base 23.

Q. What are the elements 80 that you find on the platform 23?

A. We have two angle irons which would support either side of the sack when hung onto that brace.

Q. Would you point out in the Ernst patent where the elements are that are equivalent to these angle brackets 80?

A. That would be the frame 31, which is marked, that particular portion of portions designated by the number 31 on the right-hand side directly at right angle to the platform. [116]

Q. These elements 80 in the Stehlin patent, shown in Fig. 2, mounted on the platform, do they contact the sack shown on the platform?

A. Presumably, because there is a dotted line when the sack is on the base.

Q. Will you refer to the specifications on page 3, column 2, line 82? Will you kindly read the sentence beginning on line 82?

(Testimony of J. Walker Glenn.)

A. "Means for preventing relative movement between the bag and the platform on which it stands are provided, and such means may comprise angle bars 80, 80 extending across the platform 23 in the front to back direction."

Q. As a man skilled in this field, do you consider these bars 80 equivalent to the Ernst cleat 28?

A. Yes, they would accomplish the same purpose.

Q. In the Stehlin platform, containing the cleats——

A. May I see that?

Q. Yes.

A. Did I understand you to say the cleat 28?

Q. The cleat 28 of Ernst shown in Fig. 1.

A. I would say that this angle iron on either side would accomplish the same purpose as the element 31.

Q. Is the platform 23 of Stehlin jiggered?

A. In this particular instance this platform moves [117] directly parallel to the track. There is no upward or downward motion to the carrier.

Q. What drives it?

A. It is driven with a crank, to which is connected a pitman, and the opposite end of the pitman is connected to the end of the platform.

Q. Would you see any difference in the operation if the pitman were connected to the end of the platform?

A. None whatever.

Q. The Sargent patent is on a washing-machine, and was deemed significant because of the supporting links 10 and the pitman.

(Testimony of J. Walker Glenn.)

The Williams patent, No. 1,640,103 is also a file jacket reference, showing a sack jigger for grain.

The Shaler patent, No. 1,924,202, is a sack packer, also cited by the Patent Office, and significant as showing the frame in Fig. 2.

We come then to the Naehrer patent, No. 1,719,124, which was not considered by the Patent Office, and which is submitted as one extremely important to the present consideration.

Mr. Glenn, directing your attention to Figure 2 of that patent, is there a bag supporting platform?

A. There are two stations. There is a platform, as shown in the drawing, and two stations. [118]

Q. Are those stations designated?

A. Yes, on No. 2.

Q. Are those stations interconnected in any manner?

A. Yes, they are connected with the frame No. 10.

Q. Is there an open central portion between the platform 12? A. Yes.

Q. Is this platform mounted for an oscillatory or jiggling motion? A. Yes.

Q. Is this device, then, in your opinion, operable? A. I would say so.

Q. Have you ever seen a potato device compared to the Naehrer device?

A. I have seen a grain sacking device that operates on the same order.

Q. What was this grain device employed for?

(Testimony of J. Walker Glenn.)

A. For sacking rolled barley.

Q. And for the oscillating of the bags?

A. That's right.

Q. In your opinion there is no reason why this device could not operate? A. I see no reason.

Q. Then we come to the Erickson et al patent, the Nicolas device and the Anderson patent, which is the patent [119] shown as reference, all of which show the platform jiggled by means of a pitman.

The patent to Belcher et al also employs a jigger platform, which is motivated by a pitman.

The next patent is to Belcher, and was considered but was not cited by the Patent Office, and is I believe significant.

Mr. Glenn, referring to Fig. 1 of British Patent 397,679 to Belcher——

The Court: This was not cited.

Mr. Worrel: This was not cited by the Patent Office. Do you find a container platform in Fig. 1?

A. Yes, there is a container platform No. 11.

Q. Is that platform mounted for a jostling movement?

A. It shows here it is moved by rod connected below.

Q. Is the platform mounted for jostling?

A. Yes.

Q. What jostles the platform?

A. There is a connecting rod below the platform, and the pitman, and the connecting rod is connected to an eccentric.

(Testimony of J. Walker Glenn.)

Q. What numerals identify the pitman and connecting rod? A. 11 and 25.

Q. Where is it connected to the plate? [120]

A. About the center of the platform. That is No. 25; shows about the middle of the platform in Figure 1.

Q. And it is shown in greater detail in Fig. 5 at the right-hand side.

And the succeeding patent is the German patent to Wyngaert, No. 69,746, which is a device for the sacking of various materials, on which the bag is stuck on the side and jostled.

The next patent is the German patent to Steimel, No. 512,780, which shows a mechanism for the jostling of a sack, and it is for a means for packing the side of the sack as it is being filled.

I direct your attention to the Steimel patent, Mr. Glenn. Have you read the translation of the patent?

A. I have read a portion of it. I haven't gone into this one very thoroughly. It is rather complicated.

Q. Does it jostle the sack vertically?

A. It jostles them, in a sort of swinging motion.

Q. Would be it suitable for the settling of potatoes in the bag, in your opinion?

A. Yes, any machine that will agitate, will help to settle potatoes or any other article in the bag.

Q. I skipped the one to Erickson, No. 2,043,739.

The Court: Is that in the first or second group?

Mr. Worrel: In the second group. This is rather an [121] interesting patent.

(Testimony of J. Walker Glenn.)

The Court: Who does it follow in the list?

Mr. Worrel: DeBack. It is about midway in the second group. This patent was cited in the Patent Office action on the first of the two Ernst patents, but was not cited in the second of the Ernst patents, to which is it respectfully submitted it is more clearly anticipatory.

Refer to Figure 2 of the Erickson device. What element do we find at 24, which is a little below the center, Mr. Glenn. Can you tell us what element 24 designates?

A. That designates a pan with a funnel or piped-shaped opening at the end.

Q. Is that pan or table mounted for a jiggling movement?

A. The pan 24, and the pan 28, are presumably, according to the drawing, tied together so your connecting rod or pitman is fastened to the lower portion and close to the end of 28.

Q. How is the pan supported?

A. The pan is supported on brackets or straps, to which they are mounted at one end on a block at the base, and to the pan or screen 23 at the top. 23, 24 and 28, presumably are all tied together.

Q. This unit you refer to as being tied together, 24, 24-a and 28, are they mounted for unitary movement or motion [122] together?

A. Apparently they are. I can't see why they would be driven separately, unless there is another drive on the other side. It could be 24-a and 28 are

(Testimony of J. Walker Glenn.)

independent and driven with a different pitman.

Q. Whether they are moved individually, or together, what motivates them?

A. There is shown a crank and connecting rod, connecting 28 and 20.

The Court: This is not a sacking device. This is a sorting device, for mixing fruit and so forth.

Mr. Worrel: Yes. I was merely trying to demonstrate that this was a shaker and frame that was used in segregating the fruit, and is well known in the art, to which the patent relates, and shows a jostling and shaking device, which is almost an exact duplicate to the device under consideration.

(The Court here took an adjournment until 2:00 o'clock in the afternoon.) [123]

March 9, 1949, 2:00 P. M.

J. WALKER GLENN

having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Worrel:

If your Honor please, I would like to direct one more question to Defendants' Exhibit F.

The Court: All right.

Q. Referring to the patent to Ernst Reissue 22,740, that patent relating to a sack jigger, Mr.

(Testimony of J. Walker Glenn.)

Glenn, will you kindly tell the Court in your opinion what contribution, if any, this patent to Ernst makes to the art?

A. As I stated before, in going over these other patents, I see no contribution. I also stated we have never applied the jiggling by mechanical means to the sacking of potatoes. However, of my own knowledge, I have seen machines operating in mills and warehouses which handle grain, and doing the same type of work in the jiggling and settling of grain in bags.

Q. I would like to call the witness' attention to Plaintiff's Exhibits 1, 2 and 3, in the written interrogatories, Plaintiff's Exhibit 5. Referring first to Exhibits 1 and 2 in the written interrogatories, will you describe [124] briefly the structure employed there in the machine manufactured by the Ideal Manufacturing Company?

A. In the drawing that I see here, or the picture, I should say, there is a rod, four rollers—two above and two below, the rollers being connected with four plates, two on each side and the plates connecting—the rod, rather, passing between the two upper and lower rollers.

Q. This structure or machine, which Mr. Day testified had been constructed and sold, but never used in this form, do you find a shearer mounting to the shear plate?

A. No, there are four rollers.

Q. Directing your attention to Exhibit 3 of the

(Testimony of J. Walker Glenn.)

interrogatories, you will find there are two rollers in Exhibit 3, in different positions. How many platforms do you find? A. Two platforms.

Q. What drives the platform?

A. There is a bracket and shaft, with a crank, and two pitmans, one driving the end or table of one platform, and the other connected to the end of the opposite platform.

Q. In your judgment why are two pitmans employed instead of one, in Exhibit 3?

A. If one pitman is disconnected, the one on which the pitman is disconnected would stop functioning.

Q. Are the platforms you refer to in Exhibit 3, individually mounted? [125]

A. Yes; I see no connection other than the pitman.

Q. May we have Plaintiff's Exhibit 11-A, B and C, and 12-A and 12-B. Referring to Plaintiff's Exhibit 11-A, how many platforms are employed?

A. That looks like two platforms.

Q. Are they individually suspended?

A. I am not able to see the other end, but from the appearance of the structure, I would say that they are independently suspended.

Q. Is there an interconnection of the platform?

A. Yes, there is a board—it looks like probably a 2 x 4 or 2 x 6—fastened to each end of the two platforms.

(Testimony of J. Walker Glenn.)

Q. Is there any different connection made to the platforms in 11-A?

A. If there is, I can't find it. I don't see it. I see a shaft here, but no apparent connection.

Q. Are you referring to the shaft that mounts the lower sprocket? A. That is correct.

Q. Is that connected to the platforms in any way? A. It does not appear to be.

Q. On Exhibit 11-B is there a shear plate mounted above an endless traveling belt?

A. Yes, there is.

Q. How is that shear plate mounted? [126]

A. It is mounted on the carrier that we just discussed, and as nearly as I can see, a roller, or board, or plate in the back.

Q. Are there any sleeves employed to mount the shear plate? A. I don't see any.

Q. Do you detect any latch device to lock the shear plate into position?

A. There is a latch, presumably here. That is clamped together, and along the board or plate there seems to be a piece welded, as a catch.

Q. In Plaintiff's Exhibit 11-C, is there shown a jiggling platform?

A. You can see only a very small portion of it.

Q. What portion? A. The end portion.

Q. Is there a pitman connected in driving relation to that platform?

A. That can be termed a pitman. There is a long channel iron, as it appears, from either pitman

(Testimony of J. Walker Glenn.)

or eccentric connected to the extreme right end, and connected to a cross rod or board in the foreground of the picture.

Q. Is that pitman connected to the platform?

A. No, it is connected presumably to a 4 x 4.

Q. Is that member you refer to as a 4 x 4, connected [127] to the platform?

A. That is connected with a bearing on the end of the platform.

Q. Where is the connection made to the platform?

A. On the end, and slightly off center, it appears to me.

Q. Referring to Plaintiff's Exhibit 12-A, how many platforms are shown on that machine?

A. That looks like two platforms.

Q. Is there a pitman connected to one or the other of the platforms?

A. This is not very clear, from the picture. I wouldn't want to pass judgment.

Q. Looking at the near end of the picture, in 12-A, do you see any platform connected to anything?

A. There is a sprocket, and I see a chain opposite, and I see a bearing mounted at the end—apparently a round piece—I can't tell what it is connected to.

Q. That last piece you refer to is adjacent what portion of the platform?

A. The end of the platform.

(Testimony of J. Walker Glenn.)

Q. Refer briefly to Defendants' Exhibits A and C, which relate to the same machine. How many platforms do you find on that machine?

A. Well, I find in A two platforms. [128]

Q. Pardon me. I was in error. Let us confine ourselves to A. Two platforms, in Exhibit A?

A. Yes.

Q. Are they rigidly connected?

A. There is a board or plank; not a plank, it is a 2 x 4 or a 4 x 4, on either end of the platform.

Q. Are those platforms supported for the jiggling movement?

A. The platforms are independently hung.

Q. Do you detect, on Plaintiff's Exhibit A, any picture of a jiggling mechanism?

A. No, I don't see any.

Q. Referring to Defendants' Exhibit C, how many platforms are employed?

A. According to this photograph, I would say one.

Q. Is that single platform supported for a jiggling movement?

A. Yes, apparently.

Q. Is there any means connected to the several stations of the platform for driving it?

A. No.

Q. Is there a pitman connected on the end part of the platform that you can detect?

A. I don't see any.

Q. Referring to Defendants' Exhibit D, Defendants' [129] Exhibit D, refers to a structure as

(Testimony of J. Walker Glenn.)

identified by Mr. Day's testimony, produced under the license for Mr. Biloff, do you find a shear plate in that device? A. Yes.

Q. How is that shear plate supported?

A. It appears to be a trackage there.

Q. Do you see any rollers in that photograph?

A. Yes, there are two rollers there.

Q. Do you see any sleeves in the machine shown in Exhibit D for mounting the shear plate?

A. No, I don't.

Q. Is there a latch structure shown?

A. I presume that that shown in the middle is intended for a latch—in the middle of the shear plate.

Q. What structure do you refer to?

A. The structure that holds the shear plate, and just directly above the shear plate, in approximately the center of the shear plate there appears to be a handle, as I can see it. It looks like a sleeve, and has a rod, that operates as a handle.

Mr. Worrel: That is all of the direct examination.

Cross-Examination

By Mr. Franklin:

Q. You say you took out a patent on a potato washing machine? [130] A. That is correct.

Q. And that is all that it did, wash potatoes?

A. That is all that we took a patent out on.

Q. It had nothing to do with putting potatoes in a bag?

(Testimony of J. Walker Glenn.)

A. We had necessarily the rest of the machinery which goes with it. We employed the rest of the machine, but it was not patented.

Q. The rest of the machine was not patented?

A. No, no patent was applied for on it. It was an old art.

Q. Your patent was on the washing machine?

A. On the washing machine.

Q. Did you have the patent with him?

A. No, I sold out to Mr. Swab a few years ago. I have forgotten the year, I sold out to Mr. Swab, but I sold him my interest in the washer.

Q. Do you know the number of the patent?

A. I really don't. It is of record.

Q. Can you get it for us?

A. I can get it, yes.

The Court: I don't see that we are interested in the particular patent. It is not in evidence.

Q. (By Mr. Franklin): Have you been active in the potato business since 1939? [131]

A. Yes I was, to about six years ago, then I started in the real estate business.

Q. Six years ago? A. Yes.

Q. Prior to that time.

A. I was in the potato business.

Q. Did you have anything to do with machines for sacking potatoes?

A. Yes, during the time I was in the potato business, while Mr. Swab and I were partners, we were manufacturing this machine, a sacking and a

(Testimony of J. Walker Glenn.)

screen grader and an endless conveyor belt; and after Mr. Swab and I dissolved partnership I continued in the produce business, and two of the machines we built, I had them there in a warehouse in Edison for some time.

Q. What was the construction of this machine that you say that you built? What were they like?

A. They were driven by motors, and the first machines were with a flat belt. We used a V-belt in the other machine. We used chains and sprockets. We had them equipped with sack holders, and it was a complete unit for the handling of potatoes.

Q. When did you see one of the Ernst machines for the sacking of potatoes, like the patent in suit here?

A. I have never seen Mr. Ernst's machine, other than [132] reading the patent and patents applied for; I have never seen Mr. Ernst's machine in operation to my knowledge.

Q. Neither of them, the two patents?

A. No. I might continue and say that I always owned and operated, during my time, one of the machines that we had built. I have seen some of the other machines, but I have never made myself conspicuous by delving into them. I was satisfied with my own. I haven't gone into the sheds in Shafter or Bakersfield for some little time.

Q. Taking the machine that you built, were the potato bags jiggled?

A. No, we had never applied the jiggling of

(Testimony of J. Walker Glenn.)

potatoes other than manually. However, I had seen a jigglor or jigglers used in the warehouses and mills, where they are sacking, and putting in grain and other articles—the General Mills, and such.

Q. What movement did the jigger board have—a horizontal back and forth movement, or a vertical up and down movement?

A. The particular one I had in mind was in the Delta warehouse, in Stockton; it was formerly the C. N. and I. warehouse, and that machine or a similar one was in use many years ago. I don't know that that was the exact machine, but the gentleman that showed me the machine said that it had been used many years to his knowledge. It is run on an eccentric, therefore giving a forward and backward end motion of the board and laterally and upward. In other words, it worked in this manner: It was mounted so that there was more or less of a rotary motion, forward and backward, and up and down.

Q. That was a long time ago?

A. Yes. That particular machine looked to be at least 15 years ago; I have seen a similar machine in the C. N. and I. Company. That is a steamboat company. My father was manager of the steamship company, and owned this warehouse.

Q. Do you know who manufactured that machine?

A. No. I don't think there was a number on it. It was a very simple device.

Q. Was that an automatic machine?

(Testimony of J. Walker Glenn.)

A. An automatic jigger, operated by a motor, pulley, and belt.

Q. How many bags were on the jigger board?

A. On this particular one there was one bag. I have seen them in multiples.

Q. You don't know of any of these machines in operation today?

A. Yes, that is in operation.

Q. Where?

A. At the Delta warehouse, in Stockton. [134]

Q. Do you know the length of the upward stroke of the jigger board of this machine?

A. Well I would say the offset of that roughly is about—oh, it is not over at the outside, I would say, an inch. The lateral stroke would naturally be twice that, and the upward and downward stroke would be the same.

Q. It had an inch stroke in each direction?

A. It was an offset of the cam. That would be an inch up and an inch down.

Q. Do you know the length of the hangers on the Ernst machine, on which the jigger board is suspended?

A. No, I don't.

Q. Do you know the length of the links on which the jigger board of the Ideal machine is suspended?

A. No. Apparently, from the picture and drawings of Mr. Ernst's machine, the links are longer on this than this one, I would just presume, from the location of the drawings and the picture.

Q. We have some potatoes here, and part of a

(Testimony of J. Walker Glenn.)

jigger board. Would you care to give us an illustration of what happens when it is moved vertically and horizontally.

Mr. Huebner: I don't think a demonstration on a piece of plywood board they have bought in here is significant of anything.

Mr. Franklin: To show what happens when you move it [135] vertically.

The Court: I don't think that would indicate anything.

Mr. Franklin: The only reason that I had for using this equipment was to show the difference in movement between the horizontal and vertical movement, to show what happens to the potatoes.

The Witness: Maybe, I am not supposed to be talking in an informal manner——

The Court: Go ahead; it's all right, if you want to demonstrate. If you can make the demonstration.

Mr. Franklin: He can move the board up and down and then move it sideways.

The Court: I can take judicial notice of the fact that if you take a board and move it up and down, the potato is going to jump like a jumping bean, and if you move it sideways it will fall off.

Mr. Franklin: That is all right, if you take judicial notice of it.

Q. Suppose you have this on a popcorn shaker and wire basket. When you shake this how do you shake that, vertically and horizontally?

A. Not having been a popcorn man, or having

(Testimony of J. Walker Glenn.)

made a popcorn shaker, I wouldn't know how that works.

Q. Wouldn't you say that you would shake it horizontally? [136]

A. No, I couldn't say that.

Q. Now I believe in the prior art you started with the Blank patent. You remember you testified about the Blank patent? A. Yes.

Q. This part, which you call the shearer—is it 11? A. Yes.

Q. That is mounted on an endless chain?

A. On two chains.

Q. The two chains move in unison?

A. That is correct.

Q. That is continually moving with the chains?

A. Yes.

Q. It goes in an opposite direction to the conveyors? A. That's right.

Q. As the cracker is introduced from one end, the shearer, 11, comes in an opposite direction?

A. Yes.

Q. And throws the crackers on both sides?

A. Drops on both sides.

Q. That is a continuous movement?

A. Yes.

Q. And not an intermittent movement?

A. It does not have to be driven. [137]

Q. Is that described in the patent?

A. They describe it as being driven. You will notice that there is a connection that drives the con-

(Testimony of J. Walker Glenn.)

veyor belt, and one that drives this, up here. You disconnect the chain from the conveyor belt, and your shearer remains stationary; that is all. It is moved by hand.

Q. Does the patent say you do that? Is that expressed in the patent?

A. No; I am just using my ingenuity.

Q. That is the Blank patent, No. 805,625. Now we will take the Helenbolt patent, No. 1,338,729. What is called the shearer I suppose is one of these blocks 28, is that right?

A. Yes, I believe it is—yes, 28 would be the shearer.

Q. Now, how are they supported?

A. The shearer?

Q. Yes.

A. The shearer is supported on a wire.

Q. The wire 30? A. 30.

Q. What holds it, a bearing or loops 29?

A. It calls them eyelets. In other words, the wire passes through it.

Q. These eyelets slide along the wire? [138]

A. That's right.

Q. That is only at one side of the block, is it not?

A. When I testified this morning I did not know, but I looked here and it showed 30, probably at one side, because the block is made in a V-shape, and travels along a back board, which would keep it from the potatoes.

Q. You said the wire 30, would lead to the conveyor belt?

(Testimony of J. Walker Glenn.)

A. Yes, it could lead to the conveyor belt. There would be no objection to that.

Q. That block rides rather freely on the rod, does it not? A. That's right.

Q. How is it moved along the conveyor belt?

A. It is moved by the cable 33 in Figure 5.

Q. Is the cable 33 connected on a block at one end?

A. Yes, more or less in the central portion, as shown here.

Q. This cable goes over pulleys?

A. That's right, as shown in Figure 1, and also Figures 4 and 5.

Q. And they are wrapped around the pulleys 35?

A. That's right.

Q. Up at the top?

A. Yes, sir, the pulleys 35 are apparently for keeping [139] the wire taught.

Q. Which wire?

A. The wire which moves the shear plate.

Q. 33? A. The wire 33.

Q. The pulleys on the shaft 36? The pulleys 35 are on the shaft 36?

A. That's right. The ones I just mentioned are presumably for keeping the wire taught. The other pulleys are designated 34, at the end.

Q. What do you say to this statement on page 2, line 10:

"The shafts 36 of the intermediate pulleys 35 of both belts are arranged close together and adapted

(Testimony of J. Walker Glenn.)

to be turned by cranks in either direction so that an operator standing at this one point and overseeing the work at the table may conveniently operate one or both and carry any of the deflector blocks to any desired point in rear of the table."

Doesn't that indicate that you have cranks to wind the wires 33, to move the shearer or deflector block along the conveyor?

A. Yes. I have seen them moved when they did not have cranks. [140]

Q. Yes, I suppose you could leave off a lot of things.

A. No. I am not endeavoring to do that. I am just saying that a crank is a more convenient means. The crank would undoubtedly have to be put on one of the shafts, that hold one of the pulleys.

Q. Do you see one on this?

A. Yes, it looks like a crank, and I think they are No. 36.

Q. There is no number.

A. I see no number. Presumably that is what they are.

Q. This is a sorting apparatus. That is the title of the invention. Is that used for the bagging of potatoes?

A. It is used to deflect oranges or apples or such. I have seen them in operation. They generally have a canvas on there, so it won't bruise the article.

(Testimony of J. Walker Glenn.)

Q. There is a cushion 17. When they fall they go onto the cushion 17? A. Yes.

Q. They come off onto these screens here?

A. I did not read that far in the patent, but I have seen similar ones, and they were not used as screens. It depends on the product. I would not want to roll a peach over a rough screen.

Q. It deflects the apples on the screen? [141]

A. Onto tables.

Q. Then the operator takes his culls, and puts them on the outside? A. Yes.

Q. And the good apples he takes by hand and puts in bags? A. Into containers.

Q. And that is the application he gives to the machine? A. Yes.

Q. We will take the Cunningham patent, No. 873,991. I don't know the exhibit number of that.

The Court: It will be known as the number you have given.

Q. (By Mr. Franklin): This angle plate, designated as No. 47, that is what you consider a shearer?

A. Yes. That deflects the material off of the belt or conveyor.

Q. That shearer, how is it mounted?

A. It is mounted here to this portion here, with an adjustment on it, to turn it at different angles.

Q. It is pivotly connected at one end, to be swung around an arc, is it? A. That is right.

Q. But is not connected at the other end at all?

A. No.

(Testimony of J. Walker Glenn.)

Q. This other end is free.

A. That's right.

Q. What is the range of operation of the plate 47, on the conveyor belt, indicated by 64?

A. Well, 64, up here, is your belt, but down here it takes in the entire distance across the face of the belt.

Q. The range, longitudinally of the belt, can that be operated at any point on the belt, where the belt is flat? A. That's right.

Q. It has a very narrow range of movement.

A. Having no dimensions, I have no way of guessing what that distance is.

Q. I suppose you have read this patent.

A. Not to any great extent. I have looked at them as a person having had some experience with machinery, and having helped to build some machinery. That is as far as I go.

Q. Supposing that belt was concaved, downward, transversely. Would the shearer operate?

A. Not unless the shearer were made the same way as the belt, and would follow the contour of the belt, it would.

Q. That shearer has flat edges, has it not?

A. Yes. [143]

Q. It does not show anything else? A. No.

Q. That belt is concave transversely downwardly from the roller 75 on the left to the roller 76 to the right, is that right? A. No.

Q. The rollers are 67 and 68.

(Testimony of J. Walker Glenn.)

A. Here is the roller 36. That was apparently a straight roller. You see, you have the roller 36 here.

Q. Yes.

A. You have the roller 36 here, in my interpretation, and this is 36 here.

Q. 36 and 37?

A. Yes. Your belt is flat at that place. You asked me how long that was. I don't know.

Q. Beyond those rollers 36 and 37, the belt is concave, on conical rollers? A. Yes.

Q. So a shearer with a straight edge could not operate on the belt as shown in the patent. —Take the True patent, No. 1,369,502. Here we have a plate 36, extending obliquely across two belts 4, and 38. The plate extends to the bracket at the end.

A. That's right.

Q. These parts indicated as 37, at the end of the [144] plate 36, are designated as brackets in the patent.

A. As I recall, they won't need brackets. This shearer is not movable, only by manual handling from one place to another. It does not slide.

Q. Is it your understanding that these brackets are fastened to the upper edge of the frame?

A. That is what I gather from the information here. I wouldn't say that these brackets are slideable.

Q. The patent doesn't say that.

(Testimony of J. Walker Glenn.)

A. Reading the patent it says these brackets are in a fixed position.

Q. You could not slide them on the frame?

A. I think you will find my prior testimony referred to that.

Q. We will take the patent to McBride, No. 1,504,894. What does this patent show?

Mr. Huebner: Is that to McBride?

Mr. Franklin: Yes.

The Witness: I did not testify to that. If you would care to have me, I will comment on it.

Mr. Huebner: We don't have any serious objection to prolonging the testimony, but technically, it is not cross examination.

The Court: Counsel, he did not testify to that.

(The Court here took a short recess.) [145]

J. WALKER GLENN,

resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Franklin:

Q. A jigger board that had movement of only one sixteenth of an inch upward and downward, would you say that would be a sufficient movement to settle potatoes in a sack?

A. I don't believe I am qualified to give you an answer on that. I have never experimented with

(Testimony of J. Walker Glenn.)

that. As I have mentioned, in the one I have seen, I did not take the dimensions of the offset of the cam. That machine was doing a very good job, and therefore I would have to measure before I could give a definite answer.

Q. Have you any idea what the movement was?

A. Yes. I told you I thought the cam was offset about an inch.

Q. In the Carpenter patent, No. 1,532,228, it is a beam which is indicated 6, extending completely across the conveyor.

A. If I might say, I don't think we discussed that to any extent.

Q. I won't cross examine to any extent. Just one question: The ends of that beam are stationary, aren't they?

A. That beam, after reading a portion of it,—the beam is fixed in a set position and is not movable. [146]

Q. Except possibly up and down?

A. Yes. In Fig. 2 it has a screw type head, and is movable upwardly and downwardly. This can be used as a press.

Q. It could not be moved longitudinally along there?

A. To my knowledge, I would say it looks stationary.

Q. Patent to Paisley, No. 1,818,427, this patent states that it is "Apparatus for Loading Mine Cars." I should judge that that loads ore.

(Testimony of J. Walker Glenn.)

A. I would presume that it would load anything that you would want to put in there.

Q. It says that the cars are loaded with coal or other material.

A. That's right. In this particular instance it is coal.

Q. It would be mine production, whether it is coal or mine ore?

A. Yes. It is adaptable to material moving on a conveyor belt, so far as I can see.

Q. Ore is a very heavy material.

A. Ores are heavy, and any machine built lightly would not handle them.

Q. You have a conveyor Fig. 6 which brings up the ore, or coal, whatever it is to the platform 14.

A. That is right. That conveyor is almost an exact [147] duplicate of the type of conveyor that we used in elevating our potatoes on the Paramount washer, into the washer, and depositing them into the washer. We used also the same type of elevator in our packing tubs, when we did not have a washer, before we ever operated a washer.

Q. The ore that might be on the conveyor, is delivered by the conveyor 6 onto the conveyor 14 where what you would call a shearer 30 is mounted.

A. That's right.

Q. And ore striking against that shearer is held by the ropes 33, which are wound on cleats 40, to the frame of the conveyor, is that right?

A. Will you read the question?

(Testimony of J. Walker Glenn.)

(Question read by the reporter.)

A. I believe I understand what you mean, but I think your question is rather ambiguous.

Q. The shearer is held by the ropes 33, over into 40, which prevents the ore striking against them?

A. Yes.

Q. That necessarily must be so on a machine of that kind, to be loaded into cars?

A. That is true, with any product; if it did not have anything to hold it in place, it would be pushed by the impact of the product going in an opposite direction.

Q. It has to be held in an opposite position to which [148] it is passed, for depositing the ore in cars?

A. That is correct.

Q. In the patent to Vosler et al, No. 2,026,200, the part which you call a shearer is indicated.

A. In Figure 5, more vividly.

Q. It has arms 45, which engage with a rib 44, to hold one side of the shear block in position, is that right?

A. What they actually do is to engage the bracket 45 in the slot 43, which is part of 44.

Q. 44 is the edge of the groove?

A. No, 43 is the groove. The block 42 is attached to 36.

Q. Isn't 44 a metal strip?

A. It could be metal, or made out of wood with a router, and still serve the same purpose.

Q. The patent says:

(Testimony of J. Walker Glenn.)

“The member 35 of the partition 34, which is arranged closest to the tables, is grooved at 43 and has the lower outer face thereof provided with an upwardly extending plate 44.”

The Court: That is page 3, beginning line 16?

Mr. Franklin: That's right.

A. Then you have a grooved member with a plate to form the lip, such as 45, bracket with a right angle turn at the end, and the bracket may be slid over the ends. [149]

Q. The bracket slides over the plate 44?

A. From the drawings they have a rectangular turned down edge, which engages in back, and keeps the track from moving away from the end of the board.

Q. And prevents it from moving horizontally, but permits it to move longitudinally from the conveyor? A. Yes.

Q. On the opposite side of the angle block and where 51 appears? A. Yes, that's right.

Q. That rolls along the board on which the conveyor belt travels?

A. They have a board, or belt.

Q. How is that block moved along the conveyor?

A. The block has the eyelet, as shown in 52, Figure 3.

Q. In Figure 5 also?

A. Yes, that's right.

Q. And a rope connecting it?

(Testimony of J. Walker Glenn.)

A. A rope, rod or cable, anything that would move it one way or the other.

Q. That rope goes over a pulley at one end of the frame, doesn't it?

A. It doesn't show right here. In Figure 5 it shows an eyelet. I wouldn't know, unless I read it more [150] thoroughly.

Q. On the right end of the machine, in Figure 7, isn't there a crank with a pulley that the rope extends over or winds on?

A. Yes. In Figure 2, it shows more clearly. In Figure 2 it shows 18. I am willing to assume that is the wire.

Q. Those pulleys are also shown on Figure 7?

A. Yes.

Q. In order to move the block longitudinally, you turn the crank 75, to wind the rope on the pulley? A. Yes, that would do it.

Q. Take the patent to Fuerste, No. 420,049. This is a patent for working a body churn.

A. That is right.

Q. You have little vials that are filled with cream and put in a reciprocating frame?

A. Yes.

Q. For churning?

A. Yes. I would assume in churning you would use milk or cream.

Mr. Franklin: I will ask counsel if this patent was cited against the patent for a jigger board.

Mr. Worrel: It was not mentioned in either of the file jackets of the Patent Office. [151]

(Testimony of J. Walker Glenn.)

Mr. Franklin: I admit you have got a frame for holding these vials, but that frame is not an elongated board with stations on it for holding sacks to be filled with potatoes.

The Witness: No, there are no stations.

Q. (By Mr. Franklin): It has no station or cleats like in the Ernst patent,—it has nothing like that? A. No.

Q. It would not be suitable for the sacking of potatoes, would it?

A. The cradles, with the rods, could be a board placed across there and utilized in some manner, by anyone with any ingenuity or knowledge of machinery. You could easily put a board across in place of the crate-head.

Q. That would involve quite a reorganization of this machine, would it not?

A. No, a board could be placed across the lower portion of 11 and 12, and it would work.

Q. But the patent does not show a board, with a back portion to hold the board on?

A. No, I do not contend that.

Q. The patent to Buschmann, No. 435,681, is a device for oscillating photographers' developing-pans.

Mr. Huebner: Your Honor, we did not examine the witness on that, but if counsel wants to pursue it anyway——

Mr. Franklin: I thought you did. [152]

(Testimony of J. Walker Glenn.)

Mr. Huebner: We are not making any objection to it.

Q. (By Mr. Franklin): Take the Broussard patent, No. 1,014,444. That is the first one there. It is a bag filling machine. A. Yes.

Q. Does that have a jigger board on it?

A. No; that has a platform, and crate, as it is called here, suspended at the upper portion of the framework, and a hand track is set on this platform.

The Court: Which figure are you referring to?

A. Figure 1.

Q. (By Mr. Franklin): What is this part 63?

A. 63 is, I believe, in the patent referred to as a bumper bar.

Q. What does that bump against?

A. That strikes a latch or trigger attached to the crate designated here—it is 26. I don't know whether that refers to the entire crate, but at the top it is referred to as 26. It is a cage or crate, and I assume I am correct in calling it that, and a hand truck that is setting on that and a bumper bar, by means of an eccentric goes parallel backward and forward and strikes the crate on one side; then comes back and strikes the crate on the other side.

Q. It strikes the crate? [153]

A. I am calling it a crate.

Q. And it agitates it?

A. It agitates it and causes that hand truck to bounce back and forth.

(Testimony of J. Walker Glenn.)

Q. The end of the bar strikes against Figure 57?

A. Yes, and causes the bag to be shifted laterally.

Q. And causes the bag to be shifted laterally, or the frames to be swung?

A. That's right.

Q. These bags are filled by the spout 10.

A. I believe that is right. I did not read into the patent too far, but the spout would indicate the material would be put in there and dropped into the spout and put into the bag.

Q. In your experience with potato sacking machines, have you observed machines where spouts were used?

A. Yes, we tried spouts or chutes on our first potato washers.

Q. We will take the second patent to Broussard, No. 1,025,781. What is the difference between the mechanism of this and the other Broussard patent?

A. The difference in that is very noticeable. We do not have the hand truck, and we have two bags, one on each side.

Q. Is there a jigger board in that patent? [154]

A. There is a board suspended from the upper portion of the framework, which is hung to the framework; it is hung by links or a chain, and a bumper board, and this one is now attached at the base and one end of the board, the crate, or bottom of the crate.

Q. The material is directed into the bags by the spout D and D¹?

A. As I said before, the drawing indicates that

(Testimony of J. Walker Glenn.)

is absolutely right. As I say, I read only the portions that pertain to the operation of the machine, and not as to the delivery of the products into the container.

Q. The product is delivered through these chutes into the top of the bag?

A. In this instance, these would be delivered through the chutes. It is very obvious that anything that could be delivered by means of a conveyor, as the drawing shows, would come down through a chute.

Q. That is correct in this patent?

A. That is correct, but I did not go into the details.

Q. There is no other way of delivering the product to the bags, except through D and D¹.

A. No.

Q. The patent to Stehlin, No. 1,191,243—

The Court: That was just passed over very lightly. I have no note of the witness' testimony.

Mr. Huebner: Your Honor, I think the witness did have some comment on Stehlin.

Mr. Franklin: I will make this very short.

Mr. Huebner: There was reference made to this, and particularly some comment was made with regard to the arm brackets 80, which appear in Figure 2, and the platform 23 being comparable to the cleats, on Ernst's vibrating platform board.

Q. (By Mr. Franklin): Do you find an elongated platform with stations along the platform,

(Testimony of J. Walker Glenn.)

whereby bags may be put alongside of each other lengthwise of the platform?

A. I don't see them. This shows the end view, and side view. How long that would extend, I could not say.

Q. In Figures 1 and 2, there is only a place there for one bag, is there not?

A. It only shows one bag.

Q. This patent states that it is for the purpose of bagging grain, is that correct? A. Yes.

Q. And it has a shock absorber, shown in Figure 5?

A. It states "Materials of various kinds."

Q. "More especially for the purpose of bagging grain," is what the patent says. In agitating a bag that has grain in it, is it not a fact that the movement must be smooth, and not a violent movement?

A. I can't say I quite agree to that. If I were to comment, it would be the other way; I would reverse it. Grain does not bruise in the bag very easy, whereas potatoes are more susceptible to bruising in the bag.

The Court: It does not limit it to grain specifically. On line 60, page 1, it says, "Similar economies may be effected in the packaging of various materials, as sugar, beet-pulp, etc." They also state that it is very compact, that it will take less space when being shipped in cars, boats and the like.

(Testimony of J. Walker Glenn.)

Mr. Franklin: I call attention to page 2, line 50 of the specification:

“I preferably provide spring means for controlling and smoothing out or damping the otherwise violent action of the vibrating platform, and to this end I may provide a shock absorber, which may be constructed, for example, as illustrated in Fig. 5.”

They merely illustrate there is a shock absorber shown in Figure 5 for “damping the otherwise violent action of the vibrating platform.”

A. In that instance I personally would have to disagree. That platform can only move in the same manner and the same speed, and at a constant speed, without the springs, because it has a positive drive from one end of the platform, [157] connected to the crank 29 driven by a sprocket and gear or pulley 30. The only way there could be any change in the action of that machine is when the damper is put on there, you would have to have the belt slip, with enough power to drive it, because it is fastened with a pitman at one end, and a crank on the other end.

Q. It is a shock absorber?

A. The patent says, “I preferably provide” means for damping or holding it back as it comes around, and there must be some slipping or holding up of the motor doing that.

Q. That is not described in the patent, is it?

A. You cannot slow down a positive driven job, without some kind of slipping.

(Testimony of J. Walker Glenn.)

Q. This is operated with the pulley 32, that drives that, but there is no slippage in the pulley.

A. No, but they have a positive drive.

Q. If you have a positive drive, then the patent is inoperative. This crank 20, or crankshaft, is a very short crank, isn't it?

A. That's right, apparently.

Q. Apparently.

A. There are no dimensions given. I don't know how long it is.

Q. It is shown as a short crank?

A. I presume it is. [158]

Q. It would give a short stroke? A. Yes.

Q. And a very fast stroke?

A. That would depend on the rate of speed between the motor and the pulley. The shaft could be turned at any given speed desired.

Q. That is true, but an electric motor runs pretty fast.

A. If the motor runs too fast, you can easily reduce it, or you can speed it up.

Q. Doesn't the patent show a much smaller motor than that that with which the shaft 29 is connected?

A. Yes, in this instance the drawing shows that.

Q. I will show you the patent to Sargent, No. 1,352,225, which states that it is a washing machine.

Mr. Huebner: This is one of the patents Mr. Worrel explained in passing, as a file wrapper reference. I will object to cross-examination on the

(Testimony of J. Walker Glenn.)

ground that it is immaterial, and on the ground that it is not proper cross-examination.

The Court: I will sustain the objection.

Mr. Franklin: Take the patent to Williams, No. 1,640,103——

Mr. Huebner: I object to any questions on this patent for the same reasons, your Honor.

The Court: There was nothing asked on that. I think [159] Naeher was the one placed next on the list.

Mr. Huebner: That is correct, your Honor.

Mr. Franklin: How about the patent to Shaler?

The Court: There was no examination on the patent to Shaler.

Mr. Franklin: The Naeher patent, No. 1,719,124—this patent as shown, handles how many bags?

A. It shows two platforms, and two bags.

Q. It states it has a gyratory movement.

A. That is right.

Q. That gyratory movement is a combination of a longitudinal movement of the platform and a vertical movement.

A. That is right.

Q. And the vertical movement is about four and a half times as great as the longitudinal movement?

A. That is correct.

Q. That is primarily an up and down movement, is it not?

A. Yes, that is more up and down than longitudinal.

Q. While this patent does not state that it is

(Testimony of J. Walker Glenn.)

used for grain, what is your opinion of the materials that are used in that machine?

A. It does not state anywhere in the patent. It could be used for bags. It is a bag filling machine.

Q. That has a rocking movement to the platform? [160]

A. It gives the movement of the platform shown down below.

Q. Figure 5? A. Yes.

Q. That shows—— A. It shows the arc.

Q. At the top of the bag there are spouts?

A. I might assume it would be a spout.

Q. In this connection, the patent said at the beginning:

“This invention relates to bag filling machine equipped with means for compacting the material within the bag during the filling operation, and is an improvement upon the type of machine disclosed in Patent No. 1,616,016.”

You have never seen that patent yet?

A. No, I have not.

Mr. Franklin: And you have not set that patent up?

Mr. Worrel: No, we have not.

Mr. Franklin: I think we ought to put in this patent.

The Court: Put it in.

Mr. Franklin: I will offer Patent No. 1,616,016.

The Clerk: 14 in evidence.

(Testimony of J. Walker Glenn.)

(The document referred to was marked Plaintiff's Exhibit No. 14, and was received in evidence.) [161]

The Court: All right. But do not examine the witness on it.

Mr. Franklin: We are entitled to cross-examine——

The Court: I think you had better finish with this witness.

Mr. Franklin: How about the DeBack patent. Was there any testimony on that?

Mr. Huebner: No testimony.

Mr. Franklin: And the patent to Nicolas.

Mr. Worrel: There was no testimony on Nicolas.

The Court: The only testimony that amounted to anything was Belcher, and just a general statement about the two German patents, and the witness said he had not examined the German patents very much.

Mr. Franklin: How about Anderson?

Mr. Worrel: There was no testimony on Anderson.

Mr. Franklin: Belcher?

The Court: Yes, 397,679. I consider that very important. I have it so marked.

Mr. Franklin: Is that the Belcher patent?

The Court: Yes.

Mr. Worrel: There was no testimony as to the patent to Belcher.

(Testimony of J. Walker Glenn.)

The Court: The specifications as to Belcher are so elaborate you don't need to explain them. He is an American [162] citizen, and it is surprising he did not get the patent in the United States.

Mr. Franklin: Is that the same Belcher?

Mr. Worrel: It appears to be the same.

Q. (By Mr. Franklin): Does that have a jigger board with stations on it on which you can put bags, so they won't trip along the board?

A. I see indications of bags on the jigger board.

Q. That is indicated at 11?

A. The boards are indicated 11, yes.

Q. There are no cleats to form a bag station?

A. On the drawing, at the bottom of Fig. 1, where the bag is rested on the jigger board, there is an indication of a V-shape. What that is, I don't know, without reading that entirely.

Q. Isn't there a conveyor over to the left of the machine, for delivering the containers on the jigger board 11?

A. Over to the left, yes.

Q. And that conveyor keeps pushing the containers over the jigger board from the left to the right-hand, does it not?

A. Yes, that indicates that is the way they are moved.

Q. Then they are moved from one end of the jigger [163] board to the other?

A. Yes. I might say the board appears to be smooth. There is no indication of cleats.

Q. If there were cleats, they would show?

(Testimony of J. Walker Glenn.)

A. Yes.

Q. And the container could not be pushed along?

A. No.

Q. In the Ernst patent, the boards are straight or parallel? A. Yes.

Q. This jigger is not horizontal and longitudinal? A. It is upward and downward.

Q. It is in the center?

A. The agitator is approximately in the center, I would say.

Q. The ends of the board are not moved at all in either direction; they are fixed.

A. Is that fixed, or is there an allowance made for movement? I did not read the specification, so I would not say they were or were not.

Q. Take page 2 of this patent, line 71:

“The means provided for imparting a vibratory motion to the plate 11 is best shown in Figures 1 and 5, and comprises a connecting rod 25 having its upper end pivotally connected to the [164] bottom of the pin 27. The lower end of the connecting rod 25 engages an eccentric 28 provided upon a main operating shaft 29, mounted in suitable bearings 31, and a gear housing, shown in Figure 1.”

Isn't that connection for the purpose of imparting an up and down movement to the board intermediate to its ends?

A. What you have just read does not necessarily indicate that. The board is fastened down in a

(Testimony of J. Walker Glenn.)

fixed position at each end. I was looking at 13 or 14, which will probably give the answer.

Q. I will pass it up.

The Court: Do you want to examine as to the two German patents?

Mr. Franklin: Yes. The Erickson patent I did not examine as to that.

Mr. Huebner: Yes. We had some questions on the Erickson patent. It is pretty clear as to what his device is. There is no conflict between the testimony of Mr. Glenn, and whatever is in the patent application.

The Court: That is the fruit mixing machine?

Mr. Huebner: Yes.

Mr. Franklin: This is Patent No. 2,043,739 to Erickson.

Q. Take these plates 10, 11, 12, 13 and 14, Figure 1—— A. Yes. [165]

Mr. Huebner: Your Honor, we did not ask any questions about those plates.

The Court: If you examined as to the patent, he has a right to examine as to something you did not examine about.

Q. (By Mr. Franklin): These plates are stationary?

A. Yes, the plates are stationary.

Q. There are a number of them?

A. That is correct.

Q. One for directing material into each device, 1, 2, 3, 4 and 5? A. Yes.

(Testimony of J. Walker Glenn.)

Q. And being stationary, they are not moved longitudinally along the belt? A. No.

Q. Take Figure 2, on which I will examine. There is the receptacle C and D? A. Yes.

Q. And there is the spout 22, which leads from the receptacle C and D into a conveyor, from which the diced fruit is delivered from the said device 1, 2, 3, 4 and 5. A. That is right.

Q. It is delivered from the spout 22 into the trays C and D? A. That's right. [166]

Q. These German patents—first we will take the patent to Wyngaert, No. 69,746. Does that show a jigger board? A. No, it does not.

Q. What does it show?—There is this part, either 1 or e. I think it is e.

A. That is merely a means for sticking the bag on the side, and, as I understand it, is to fill the bag and settle the product in the bag. We did not discuss that.

Q. You did not read that in German?

A. No, I had a translation.

The Court: It is a very simple patent. All he claims is just the means for shaking it, and it packs down.

Mr. Franklin: That part is the beater.

A. Yes.

Q. The same is true of the patent to Steimel, No. 512,780, also a German patent? A. Yes.

Q. Does that have a jigger board on it?

A. That has a frame, where the bag is jilted back

(Testimony of J. Walker Glenn.)

and forth, and on the bottom and sides at the same time, alternately or intermittently.

Q. That beater is shown as a rectangular object in front of the bag?

A. Yes. It is on the front or side of a portion of [167] the bag, about half way between the top and the bottom.

Mr. Franklin: I was wondering if these patents are set up against the claims in issue. There is a beater set up in one claim. We have selected Claim 1 of each patent. That has no beater in it.

The Court: That is true. They are attacking the validity of the entire patent.

Mr. Franklin: Are these claims set up against the claims in issue?

Mr. Huebner: They will be used, yes.

Mr. Franklin: I know there was some testimony on the Bradbury patent No. 826,988. As I understand your testimony, you contend that the part indicated S——

The Court: What figure are you looking at?

Mr. Franklin: Figure 1. That the S was a jigger board, is that right?

A. Where is the figure S. You refer to it as the portion between 101 on the right-hand side and 71 on the left-hand side?

Q. It is called a shoe, on page 4, line 17:

“The shaking-shoe is driven by a pitman 100, connected with the crank 101, upon the fan-shaft 87.”

(Testimony of J. Walker Glenn.)

A. Yes, there is a screen and a pan in this particular instance. I am to a certain degree familiar with harvesters [168] and harvesting equipment, so I did not go through a lot of this. I have had occasion to be around harvesters, and have made some repairs on harvesters.

Q. This machine is a grain-separator?

A. That is right; it is what is termed a harvester or combine.

Q. It has a screen that is numbered 73?

A. Yes.

Q. That is used for cleaning the grain after it has been in the machine? A. Yes.

Q. And then they pick up the residue and clean it?

A. Yes. I refer to this as being similar to the old type shaker.

Q. The board is suspended on links, and it has no station for holding the bags? A. No.

Q. It is included in the housing? A. Yes.

Q. There is no way by which you can set the bags on 72?

A. No, I do not see that it is used for that purpose.

Q. And shown in the drawing it cannot be so used?

A. No, I never assumed it was used for that.

Mr. Franklin: How about Bates—was there any testimony on that? That is an old one.

(Testimony of J. Walker Glenn.)

Mr. Worrel: There was some testimony on Figure 2 of Bates.

Mr. Franklin: Figure 2 of the patent to Bates, No. 643,102—

The Court: This is the one that had twenty-three or four figures.

Q. (By Mr. Franklin): Does this Bates machine have an elongated surface, jigger board—a jigger board with stations on it? A. No.

Q. Which is reciprocating?

A. No. It merely has a plate, and is moved upward and downward by the mechanical means it shows.

Q. Do you know what that machine is used for—what kind of material?

A. It presumably would be used for grain, corn, beans.

Q. And salt and flour?

A. It could handle salt and flour and sugar. The mere structure of the machine itself would indicate that you would have difficulty in putting potatoes through the funnel.

Mr. Franklin: This is the Norkewitz patent. It is the second patent in the first group of references on the shear plate. [170]

The Court: Yes.

Mr. Franklin: It is No. 860,936 to Norkewitz. As I remember it, the shear plates were indicated at 32 on this patent, is that right?

A. No. There are two sets of shear pates, if you

(Testimony of J. Walker Glenn.)

want to call them that; they are 32; which move the product for putting them across the belt more or less in a straight line.

Q. They direct them against 35? A. Yes.

Q. That is for handling bottles?

The Court: Yes, that is right.

Q. (By Mr. Franklin): This shows that the plates 33 are fixed? A. Yes, that is right.

Q. There are a number of them?

A. That is correct.

Q. And they are moved longitudinally along that conveyor from one position to another.—That is all.

The Court: Any redirect.

Mr. Huebner: No redirect, Your Honor. The defendant rests.

The Court: I want to know what you are going to offer in rebuttal.

Mr. Franklin: I haven't very much more to offer, your [171] Honor. I have a working drawing of the movement of our jigger board, and that will be very short.

The Court: Put it in now.

Mr. Huebner: May I ask Mr. Franklin if he intends to offer the deposition of Mr. Gearing?

Mr. Franklin: Yes.

The Court: You may offer the deposition, unless there is some objection on which you want me to pass, unless I order it transcribed, and read before the argument.

Mr. Huebner: Your Honor, it has been transcribed.

The Court: I mean as a part of the record.

Rebuttal

HENRY J. STOLZ

recalled as a witness in rebuttal, by Mr. Franklin.

Direct Examination

By Mr. Franklin:

Q. Mr. Stolz, do you know the length of stroke of the jigger board of the Ernst machine?

A. The length of the stroke forward and backward is two inches.

Q. I just asked you if you knew.

The Court: He has answered the question.

Q. (By Mr. Franklin): I hand you a drawing and ask you who made that drawing?

A. I made the drawing. [172]

Q. What is the drawing?

A. The drawing is of the jigger board of the Ernst sacker covered by this patent, and has a side-wise motion of two inches and an up and down motion of a maximum of one-sixteenth of an inch.

Q. And you have the dimensions of the horizontal motion. Where is that shown?

A. In the lower part of the drawing.

Q. And it moves one inch on each side of the center? A. Yes.

Q. And gives a maximum stroke of two inches?

(Testimony of Henry J. Stolz.)

A. One inch on each side.

The Court: The way I have it, it would give four inches.

Mr. Franklin: It gives one inch on each side of the center; two inches all together.

Mr. Huebner: I am going to object to a question of this character upon the ground that it is immaterial. The patents do not teach how much it is.

The Court: So long as we do not have a demonstration, I do not think it will do any harm.

Q. (By Mr. Franklin): What is the length of the links which suspend the jigger board?

A. About one inch long.

Q. And the arc? [173]

A. The arc has a maximum of one-sixteenth of an inch.

Q. Is it indicated?

A. As indicated on the drawings.

Mr. Franklin: I offer the sketch in evidence.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(The drawing referred to was marked Plaintiff's Exhibit No. 15, and was received in evidence.)

Q. (By Mr. Franklin): While you have been with Mr. Ernst are you familiar with the various elements in the development of the Ernst machine?

A. Yes, I am.

Q. In your experiments, did you ever try to use

(Testimony of Henry J. Stolz.)

spouts for directing the products on the conveyor?

A. I did. We tried to use spouts, but they were not successful.

Q. Did the potatoes choke up in the spout?

A. Yes, and you could not get them into the sacks.

Q. Did it render the operation uncertain?

A. Definitely. If you do not get the potatoes into the sacks, the machine is of no value.

The Court: Is there any objection to the testimony in the deposition?

Mr. Huebner: We have no objections. [174]

The Court: The deposition of Mr. Harry Gearing will be received in evidence, as part of the plaintiff's case in rebuttal.

Mr. Huebner: There are some stenographic errors in that that Mr. Franklin and I have not got together on, because it was only received a day or two ago.

The Court: It is not signed.

Mr. Franklin: Mr. Gearing read it over in my office.

Mr. Huebner: I thought it well that I might make the suggestion and reserve the right, subject to your approval, of making corrections that are obvious.

Mr. Franklin: Yes.

The Court: All right.

The Clerk: That is Exhibit No. 16.

(The deposition referred to was marked Plaintiff's Exhibit No. 16, and was received in evidence.)

The Court: Mr. Gearing has testified as a patent expert. It may be received. The deposition will be received, and the Court will read it and order it transcribed in any record prepared in this case.

The Clerk: Plaintiff's Exhibit No. 16.

(Argument.)

[Endorsed]: Filed July 19, 1949. [175]

PLAINTIFF'S EXHIBIT 16

In the District Court of the United States, Southern
District of California, Northern Division.

Civil Action No. 721-N.D.

EARL A. ERNST,

Plaintiff,

vs.

A. G. CLEMENS, et al.,

Defendant.

Deposition of Harry Gearing

taken on behalf of the Plaintiff herein, at the law
offices of Messrs. Huebner, Beehler, Worrel, Herzig
& Caldwell, in the Story Building, Broadway and
Sixth Streets, Los Angeles, California, on Monday,
February 28, 1949, and Tuesday, March 1, 1949, be-
fore Paul Lehnhardt, Jr., a Notary Public, pursuant
to stipulation, (copy of which is hereto annexed.)

Appearances:

ALAN FRANKLIN, Esq.,

on behalf of the plaintiff;

HUEBNER, BEEHLER, WORREL, HER-
ZIG & CALDWELL,

By Herbert A. Huebner, and

Richard M. Worrel, Esqs.,

on behalf of the Defendants.

Plaintiff's Exhibit 16—(Continued)

STIPULATION

It Was Duly Stipulated by and between counsel for the respective parties herein, that the deposition of Harry Gearing, be taken on the part of the plaintiff herein, before Paul Lehnhardt, Jr., as Notary Public and certified Court Reporter, commencing at 2:00 o'clock p.m. on Monday, the 28th day of February, 1949, at the law offices of Messrs. Huebner, Beehler, Worrel, Herzig & Caldwell, Story Building, Los Angeles, County of Los Angeles, State of California, pursuant to the terms of that certain "Stipulation," a copy of which is hereto annexed, and which has been duly signed by the attorneys for the respective parties litigant herein.

That, the said deposition and testimony of the said witness shall be taken, to be read and used in evidence in said cause at any trial thereof or proceedings therein, subject to the same objections and exceptions as if said witness were personally present on the stand, but without objection or exception to the time, place, or manner of taking the same, or to the form of the question, unless noted at the time.

It Was Further Stipulated, that the said deposition, at the conclusion of the taking thereof, may be read to the said witness and be signed before the officer taking said deposition, at a time and place fixed by the officer [2*] acting herein.

It Was Further Stipulated, that as soon as the officer completes the reading to the witness of his said deposition, and has duly certified thereto, that

* Page numbering appearing at top of page of original Reporter's Transcript.

Plaintiff's Exhibit 16—(Continued)

the same be promptly transmitted to the Clerk of Court, in the District Court of the United States, Southern District of California, Northern Division, sitting to hear this said action, at Fresno, California; the said cause being set for trial to be commenced on Tuesday, March 8th, 1949.

It Was Further Stipulated by and between counsel for the respective parties that Mr. Alan Franklin, counsel for the plaintiff herein, may retain the documents in his possession which have been marked by the Notary on the part of the plaintiff for purposes of identification herein, subject to the agreement between counsel that Mr. Franklin make the same available to counsel for the defendants at the time of the trial. [3]

In the District Court of the United States, Southern
District of California, Northern Division.

Civil Action No. 721-N.D.

EARL A. ERNST,

Plaintiff,

vs.

A. G. CLEMENS, et al.,

Defendants.

Be It Remembered:

That, pursuant to the "Stipulation," (copy of which is hereto annexed), and the oral stipulations of counsel for the respective parties, embodied herein

Plaintiff's Exhibit 16—(Continued)

and made a part hereof, commencing at the hour of 2:00 o'clock p.m. on Monday, the 28th day of February, 1949, before Paul Lehnhardt, Jr., a duly qualified Notary Public, and as such duly commissioned to administer oaths, taken at the law offices of Messrs. Huebner, Bechler, Worrel, Herzig & Caldwell, of counsel for the defendants herein, Story Building, in the City of Los Angeles, California, personally appeared Harry Gearing, a witness produced on behalf of the above-entitled plaintiff.

That, Messrs. Herbert A. Huebner and Richard M. Worrel, appeared as counsel on behalf of the said defendants herein; [4]

That, Alan Franklin, Esq., appeared on behalf of the said plaintiff;

Whereupon, the following testimony was taken, evidence adduced, and proceedings had, to-wit: [5]

HARRY GEARING

a witness produced on behalf of the plaintiff herein, having been first duly sworn by the Notary, according to law, to speak the truth, the whole truth, and nothing but the truth, being examined in chief by Mr. Franklin, testified as follows:

Direct Examination

By Mr. Franklin:

Q. What is your occupation, Mr. Gearing?

A. Consulting Engineer and patent expert.

Q. Have you had any experience in designing and building machinery?

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

A. I think, all my life, fifty years.

Q. Did you learn the trade of machinist?

A. I did.

Q. Are you a machinist? A. I am.

Q. Have you done any development work in working out and developing inventions?

A. I have.

Q. You are experienced in working out and developing inventions? A. I am.

Q. Have you testified heretofore as a mechanical expert in patent litigations? A. I have. [6]

Q. Can you name a couple of cases?

A. I can't give you the dates, but there were a couple of cases I handled for the late Raymond Ives Blakeslee, in connection with Boyle Manufacturing Company and the Merritt Company—

Mr. Huebner (Addressing the witness): Pardon me, what was that first name?

The Witness: Boyle Manufacturing Company.

Q. (By Mr. Huebner): "Boyle, B-o-y-l-e"?

The Witness: Yes. (Continuing) I also testified —(Pause). Let's see (pause) I can't remember the name of the firm now, but we had a case in connection with brick-setting machinery, (pause) I don't remember the name of the firm now, that— .

Q. (By Mr. Franklin): Any others?

A. I developed all the models and got together all the equipment in connection with the patent litigation between the Union Tool & Supply Company, in

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

connection with rig irons. And I was an expert for Mrs. Pererya. (Addressing Mr. Franklin): Is that the way you pronounce it?

Mr. Franklin: (Pronouncing) "P-e-r-e-r-y-a."

The Witness: (Continuing) On a tortilla machine.

Q. Who was that case tried before?

A. Judge Yankwich.

Q. Have you ever studied the patents [7] in suit, the patents to E. A. Ernst, reissue 22,740, April 2, 1946, for sack jigger? A. I have.

Q. And a patent to F. J. Ernst, number 2,288,159, dated June 4, 1942, for a sacking device?

A. I have.

Q. Are you familiar with the mechanism of those patents? A. I am.

Q. Well, can you just state, generally, what the patent of E. A. Ernst, re-issue 22,740, consists of; what it's for?

A. It's particularly adapted (pause) in the patent (pause) for the jogging of potatoes so that they will take compact form in the sacks, and, of course, it could also be used for other like articles.

Q. Well, state how they are put in the sacks.

A. They come along on a belt (pause) on a traveling belt (pause) and have an arm (pause) or what is stated in the patent, I think, as a "jiggerboard" (pause) which limits the flow at the wish of the operator, so that they will all flow to any given sack

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

until such time as the sack is filled, when the jigger-board is moved to the next sack.

Q. "Jiggerboard"?

A. Well, it's not a jiggerboard. (Pause.) It's a board. [8]

Q. Well, point it out; what is it there? (Counsel refers to document which the witness is perusing.)

Mr. Huebner (Addressing counsel): Pardon me, don't you want to have the patent marked for purpose of identification, if you are going to refer to it?

Mr. Franklin: Yes. (Hands the Notary document.)

The Notary: Gentlemen, this will be marked as Plaintiff's Exhibit Number One for purposes of identification.

Mr. Franklin: Well, wait a minute. (Addressing the Notary.) Just hand that back to me for a minute. I have them arranged a little differently on my notes, so I think I will have you mark that one "Plaintiff's Exhibit Number 2" for purposes of identification; that's the re-issue patent 22,740.

The Notary: Very well, it will be so marked, gentlemen.

(The said document so handed to the Notary was thereupon marked "Plaintiff's Exhibit No. 2" for purposes of identification.) [9]

Q. (By Mr. Franklin): What was that part you referred to?

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

The Witness: May I have this? (Referring to document.)

Mr. Franklin: Yes.

The Witness: (Examining document) The point I referred to was number seventy-two. (Pause.) Let's see what they call it. (Examining document.) "Shearer." (Pause.) "Baffle Plate or Shearer."

Mr. Franklin: All right.

Q. (By Mr. Franklin): You spoke of a jigger-board; what was that?

The Witness: (Perusing document.) The jigger-board is the board at the bottom of the machine on which the potato sacks rest.

Mr. Franklin: All right.

Q. (By Mr. Franklin): And can you state the operation of that?

The Witness: The board alone? Or do you want it in connection with the sacks?

Mr. Franklin: Well, yes, the function of it; what it does.

The Witness: Well, (perusing document) the sacks are hung from hooks—(pause)—"Hooks 36"—(pause)—which are attached to a top framework so as to hold the mouth of the sack open—(pause)—and that top framework is indicated as "37," (perusing document) I believe it is. [10] (Examines document.) Yes. (Pause.) Supporter hoops in the frame unit number 37. The bags hang loosely from these and rest on the jiggerboard at the bottom of

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

the machine—(pause) which jiggerboard is vibrated back and forth so as to settle the potatoes into the sacks.

Mr. Franklin: All right.

Q. (By Mr. Franklin): What is the number of the jiggerboard indicated by the particular number there?

A. I think it is "22." (Perusing patent.) "Platform 22" which extends the entire length of the bracket (pause)—the entire length of the platform (pause)—and requires a particularly heavy—(pause)—a very heavy bracketing to stand very heavy dashes.

Q. (By Mr. Franklin): You say it is vibrated. How is it vibrated?

A. It is vibrated by an eccentric which is operated through a series of reduction belts and an eccentric which vibrates the whole jiggerboard back and forth rather sharply. (Examining patent.) The jiggerboard is hung on suspension brace "23" supported by brackets "24"

Mr. Franklin: I see.

Q. (By Mr. Franklin): How is the vibrating mechanism—How does it vibrate the jiggerboard?

A. Well, the eccentric on the eccentric shaft (Pause) which is driven thru these series of belts, produces an oscillating motion which is transmitted through the eccentric [11] pitman—(Pause)—thru a bracket—(Pause)—Well, that bracket is marked

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

—(Pause)—Let's see whether it is "62" or "63"—

(Pause)—It consists of an angle frame. (Examining patent) "Angle Iron Locks 62" and "63" head together at the corner brace of "64."

Q. (By Mr. Franklin): Where is the vibrating mechanism located?

A. (Perusing patent) In the center of the machine.

Q. Where are the bags located on these jigger-boards?

A. To the right and left of the vibrating means.

Q. Of the vibrating means?

A. To the right and left of the vibrating means.

Q. On page one of the specifications of the patent for sack jigger (Indicating) down near the fourth line of the jigger, the fourth column, is a statement which says that one of the side portions may be omitted, the side portions being the parts indicated at "2" and "3". Suppose, for example, you omitted the side portion "2", which would also omit the motion of that portion, of the jiggerboard at that part of the machine, where would the vibrating mechanism be connected at the jiggerboard?

A. (Examining patent) At the end of the machine.

Q. If the side portion "2" were omitted, would there be an intermediate locus, or a central locus, between the side portions "2" and "3"?

A. (Perusing patent). No. [12]

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. If the vibrating means is connected at the center of the jiggerboard, or at one end of the jiggerboard, would that affect the operation of the jiggerboard? A. None whatever.

Q. Claims "1" speaks of a platform including elongated surface from the container stations, from the ends thereof, to the central end of the locus; can you indicate where those stations are?

A. (Perusing document) Yes.

Q. Where are they indicated, by what means?

A. They are indicated by the figure 37, in the general assembly drawing Figure 1 (Perusing patent) and Figure 37 in Figure 6.

Mr. Franklin: I don't think you understood the question. I meant the stations there where the bags are located.

Q. (By Mr. Franklin): Is that——

The Witness: (Interrupting) Well, the bags are hung from those loops, and are passed down thru the platform (Pause) which is indicated as Figures "30", "31" and "32" on the drawing, so that they are what might be known as member bars or means which contact the sacks—(Pause)—a certain distance down from the mouth.

Q. (By Mr. Franklin): Well, the bags—Do they rest on anything?

A. The bags rest on the jiggerboard "22". [13]

Q. Well, where are the stations? (Perusing document) It says—"Said platform including an elon-

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

gated surface with container stations." Where are the container stations, and what are they indicated by?

A. (Perusing Patent) The container station is the portion of the jiggerboard immediately below the frame on which the bags are hung. (Witness indicates)

Mr. Franklin: (Perusing document) Yes.

The Witness: (Continuing) —and they rest on the jiggerboard, (indicating) which jiggerboard has some cleats (indicating) "28" for the purpose (Pause) I would say, (Pause) to hold the bottom of the bag in position.

Q. (By Mr. Franklin): Well, they hold them in position in what manner?

A. So that they will move positively along with the jiggerboard.

Q. What is the shape of the jiggerboard?

A. It's a long platform which may be made any length desired to accommodate any number of station, and the suitable width to accommodate the size of the bag which may be in use.

Q. Well, what is the shape? Is it straight, or circular, or what shape is it?

A. Well, it's a long, flat, surface.

Q. Like a board?

A. Like a board. (Pause) With cleats on it—[14] (examining patent) at the stations to steady the sacks.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Mr. Franklin: All right.

Q. (By Mr. Franklin): Do the cleats steady the sack? A. Yes.

Q. Why is the jiggerboard made straight, like a board?

A. It's the simplest form to make it. (Pause) I don't know of any reason to make it any other shape.

Q. Is that the best way to make it for this particular machine? A. Yes, I would say.

Q. Why?

A. Well, if you made it curved, it would be high at one point and low at another, and then you would have to have different lengths of sacks, and the sacks which were on the high part—(Pause)—it would have a tendency to slip down to the portion where the lower sack was, (Pause) shove the lower sack into place, and would call for a lot of workmanship which is not necessary.

Q. What kind of a conveyor do we have on this machine?

A. What is commonly known as a "belt conveyor."

Q. Flat, or what shape?

A. It is a flat belt conveyor.

Q. Where is the belt conveyor located on the machine?

A. From the rear, where the operator stands to handle the sacks of potatoes—

Mr. Franklin: I spoke of the conveyors; (Indi-

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

eating) [15] that's where you dump the potatoes on? (Examining documents) What's that? (Indicating) "Conveyor 46" in the patent?

The Witness: Well, "Conveyor 46" is really two conveyors, (Pause) one extending to the right and the other to the left. (Pause) They are flat belt conveyors.

Mr. Franklin: All right.

Q. (By Mr. Franklin): Now, what part of the machine are they located in?

A. Well, they are located, as I say,—(Pause)—They are located (Examining patent) on a level with the mouth of the bags—(Pause)—and from the rear—(Pause)—where the operator stands to load the sacks.

Mr. Franklin: All right.

Q. (By Mr. Franklin): And where is the jiggerboard located?

A. Over the surface of the conveyor belt—(Pause)—The "jiggerboard", I understand you to say?

Mr. Franklin: (Nods affirmatively)

The Witness (Continuing): —The jiggerboard is located immediately in front of the conveyor belt—(Pause)—between where the operator stands and the conveyor belt—(Pause)—and down close to the floor.

Mr. Franklin (Addressing witness): May I have that?

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

The Witness: Yes. (Hands document to Mr. Franklin)

Q. (By Mr. Franklin): Take this patent to Stehlin, patent number 1,19 243, and state, generally, what that is. [16] (Handing witness document)

Mr. Huebner (Addressing counsel): I suggest that the patent you are referring to be marked, at least for identification!

Mr. Franklin: All right. (Hands document to the Notary.)

The Notary: This, gentlemen, is being marked "Plaintiff's Exhibit Number 1 for Identification," this document being marked "F. J. Ernst #2,288,-159, dated June 30, 1942, "Sacking Device;" counsel for the plaintiff herein having indicated that he desires that one marked as the first exhibit—(addressing counsel)—That's right, isn't it?

Mr. Franklin: Yes. And mark this one (indicating) "Plaintiff's Exhibit Number 2 For Identification," if you will, please.

(The said documents were thereupon marked respectively "Plaintiff's Exhibit Number 1 for Identification," P. L., Jr., Notary, 2/28/49," and "Plaintiff's Exhibit Number 2 for Identification," P. L., Jr., Notary, 2/28/49." [17])

Mr. Huebner (Addressing counsel): What are you going to mark that Stehlin Patent?

Mr. Franklin: I wanted to get #1 and 2 first.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

I started off with this patent here (indicating) in the complaint (indicating) as the first one, and I like to be consistent thruout.

Mr. Huebner: Oh, I see!

Mr. Franklin: Well, this Stehlin patent, which I just spoke of, that one I will ask the reporter to mark for purposes of identification "Plaintiff's Exhibit #3."

(Addressing the reporter.) Will you please mark it?

(The said document thereupon handed to the Notary was marked "Plaintiff's Exhibit #3 for Identification." [18])

Q. (By Mr. Franklin): You have examined this patent, Mr. Gearing?

Mr. Huebner: I think you'd better indicate for the record which one that is, "Plaintiff's Exhibit #3 for Identification"?

Mr. Franklin: Yes.

Q. (By Mr. Franklin): Will you state, generally, what it is for?

A. It's a machine for sacking small grains or sugar, or similar articles.

Q. Does it have a platform, including an elongated surface with container stations from the ends thereof, to a central open locus?

A. (Perusing document): No.

Q. Take the first figure "1" there, (counsel points to place on document) how many bags are handled on that?

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

A. (Perusing patent): One.

Q. And is it vibrated?

The Witness: (Nods head in the affirmative.)

Q. Does it have any means for vibration of the bag?

A. Yes, it's vibrated by a crank—(Pause)—and limited in that vibration by some of the length of—(Pause)—the stroke being taken up by springs—(Pause)—so that the vibration shall be soft and rapid, rather than long—(Pause)—so that the vibration shall be soft and a rapid, rather than a long, harsh stroke. [19]

Q. Is the vibration of that mechanism violent, or did you say—

A. It's short and soft—(Pause)—It's shortened by the springs, so that it will be a vibratory motion without shock.

Q. What's the function of the spring?

A. To absorb the shock, so as to change the expression of the stroke at each end of the crank.

Q. Do the springs form a shock absorber?

A. Yes.

Q. Is there a shock absorber on the E. A. Ernst patent in suit, re-issue 22,740? Just let us get the number on that. That's "Re-issue 22,740," is that right? A. Yes.

Q. Is there a shock absorber on E. A. Ernst patent in suit #22,740; is there a shock absorber for vibrating the jiggerboard? A. No.

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Q. Would a shock absorber on that jiggerboard be desirable?

A. No, you might just as well cut down on your crank movement.

Q. What would you say is the vibration of this jiggerboard in this patent in suit?

A. (No response.)

Q. Well, is it soft, or smooth, or is it a violent [20] vibration?

A. It's intention is to be sharp and hard, so as to give a jar to the article and make it move from one position to another.

Q. Is that hard vibration you speak of—does that have any relation to the product that is handled by the machine?

A. The finer the particle—(Pause)—The finer the product—(Pause)—the more vibration is necessary and the smaller the vibration.

Mr. Franklin: Well, I am speaking of—

Q. (By Mr. Franklin): This machine handles potatoes and other articles? You say that this had a harsh, violent vibration; is that necessary for that particular article?

A. Well, it's more or less necessary so as to shake such an article as a potato or lump—(Pause)—to make it jump—(Pause)—to make it settle from one place to another.

Q. What is the Stehlin patent? What does that handle? Sugar and small grains, doesn't it?

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

A. (Perusing documents): Sugar and small grains.

Q. In this Stehlin patent, on page 2 of the specifications——

The Witness: Which one are you referring to?

Mr. Franklin: That is the Stehlin patent, column 1, down about line 50. (Indicating.) [21]

“I preferably provide spring means for controlling and smoothing out or damping the otherwise violent action of the vibrating platform, and to this end I may provide a shock absorber, which may be constructed, for example, as illustrated in Fig. 5.”

Mr. Franklin (Indicating to witness): Right there.

(Witness peruses place indicated in document.)

Q. (By Mr. Franklin): Do you consider that necessary for handling grains, such as sugar?

A. Well, it has a beneficial effect, because if small grains are thrown with too harsh a movement, they will pack, and the only action desired in the settling of grains is to overcome what might be called “caving.” If you try to settle fine material into a sack, it will form a “cave”, or a hollow, in the center of the sack, and this soft vibratory motion makes that cave fill in.

Q. Would you consider the vibrating motion in the Stehlin patent sufficient to handle potatoes, oranges, and articles of that kind?

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

A. I wouldn't think it was necessary because you would be absorbing half of the beneficial stroke in the springs in transmitting it to the article you were trying to shake into position.

Q. Well, would that give a proper vibration to settle potatoes into sacks? [22]

A. No, it would be too find a vibration.

Mr. Franklin: All right. I believe that we have already had that marked for identification. That's "Plaintiff's Exhibit #3 for Identification."

Q. (By Mr. Franklin): Now, take the patent of Fuerste #420,149, patented January 28, 1890, "Working Beet Churn." May I ask you if you have examined that patent?

(Addressing the Notary): May I suggest that you mark it for identification?

(The said document so handed to the Notary and Court Reporter, was thereupon marked "Plaintiff's Exhibit #4 for Identification.")

Mr. Huebner: You are just having these marked for the purposes of identification, aren't you?

Mr. Franklin: Yes. All I wish is to have these marked for identification. The next one is Exhibit 4.

(Addressing counsel): I would like to retain these patents in my possession. They will be on hand when we read these depositions into the record in court. I want to retain them because I will have to do considerably more studying on this case before we go to trial.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Mr. Huebner: Yes, we will have to do some more studying, too. I think we can stipulate as to that.

Mr. Franklin: Yes.

Q. (By Mr. Franklin): Will you state if you studied that patent?

A. (Perusing Plaintiff's Exhibit #4 for Identification): Yes.

Q. And are you familiar with it?

A. Yes, I think so.

Q. State what it is.

A. It's a churn for testing cream.

Q. How does it test it?

A. The cream is placed in vials, and locked in what I would call a "basket", and then shaken back and forth to produce the cream.

Mr. Huebner (Addressing the reporter): Will you be good enough to read the last question and answer, please? [24]

(The last question and answer were read by the reporter, as follows:

"Q. How does it test it?

A. The cream is placed in vials, and locked in what I would call a 'basket', and then shaken back and forth to produce the cream.")

Mr. Huebner (Addressing the reporter): Thank you.

The Witness: I will change that to "butter".

Q. (By Mr. Franklin): Well, for what purpose?

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

A. For testing different samples of milk, because in two quarts of milk, those two quarts of milk may have a different butter fat.

Q. That's for testing? A. Yes.

Q. Does that machine have a platform?

A. (Examining patent): No.

Q. Does it have a platform, including an elongated surface with container stations from the ends thereof? A. No.

Mr. Franklin: All right. We will take up the next patent here (indicating) to Buschmann #435,681, September 2, 1890. First, we will have this marked as "Plaintiff's Exhibit No. 5 for identification."

(Addressing the Notary): Will you please mark it?

(The said document was thereupon marked "Plaintiff's Exhibit No. 5 for identification".)

Q. (By Mr. Franklin): Will you examine that patent, Mr. Gearing? (handing witness document)

A. (Perusing document): Yes.

Q. Does it have a platform?

A. (Examining patent): No.

Q. Does it have a platform, including an elongated surface with container stations from the ends thereof? A. No.

Mr. Franklin: All right.

Q. (By Mr. Franklin): Going back to this

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Stehlin patent, and referring to Figs. 9 and 12, does it have a support for the bags?

(The witness nods his head in the negative.)

Mr. Huebner: Answer so the reporter can get it.

The Witness: "No."

Q. (By Mr. Franklin): Well, I will ask you, does it have a jiggerboard on it? A. No.

Q. Does it have a platform, with, or including an elongated surface containing stations from the ends thereof?

The Witness: Will you let me have that question again, please?

Q. (By Mr. Franklin): Does it have a platform with an elongated surface containing stations from the ends thereof? A. No.

Q. Well, state, generally, what form that Stehlin patent consists of?

A. (Perusing "Plaintiff's Exhibit #3 for Identification"): According to Fig. 9, it's a round table, having a hopper in the center which feed into locations where an operator would stand and place a sack underneath—(Pause)—a round table having hoppers in the center which feed into locations where an operator would stand and place a sack under them—(Pause)—underneath the mouth of the hopper, and the sack would receive a vibratory motion from the shake of the table top.

Q. And that's a circular table, is it?

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

A. Yes.

Q. Does that circular table rotate?

A. No. It oscillates by the crank motion.

Mr. Franklin: All right.

Q. (By Mr. Franklin): Now, would it be possible to feed the bags from that device in a straight endless conveyor successfully?

A. (Examining patent): No.

Mr. Franklin: All right.

Q. (By Mr. Franklin): I will hand you the patent of Bradbury, #826,988, for grain separator, and ask you to state, generally, what that patent is. (Handing witness document.)

Mr. Huebner: Are you going to ask the reporter to mark that one? [28]

Mr. Franklin: Yes. (Handing document to Notary) That will be marked "Plaintiff's Exhibit #6 for Identification."

(The said document so handed to the Notary by counsel for the plaintiff, was thereupon marked "Plaintiff's Exhibit #6 for Identification." [29])

Q. (By Mr. Franklin): What sort of a machine is that?

A. (Perusing "Plaintiff's Exhibit #6 for Identification"): It's a grain separator whereby the grain is passed over screens, depending on the pressure of the air, the lighter particles such as chaff,

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

and so forth, are blown away from the grain, and the grain is separated from the gross material, as it comes into the machine.

Q. (By Mr. Franklin): In other words, it separates the wheat from the chaff? A. Yes.

Q. Is that right? A. That is right.

Q. Now, does that machine have a platform, including an elongated container station or stations from the ends thereof?

(Witness shakes head in the negative.)

Mr. Huebner: You're nodding your head again, Mr. Gearing. He (indicating the reporter) doesn't get the nod.

Q. (By Mr. Franklin): I say, does that machine have a platform with elongated container stations from the ends thereof, for supporting bags?

A. No.

Q. Is it a bagging machine?

A. This may be or may not be. (examining patent) I don't know about that. (Pause) Some of these machines are bagging machines. (Pause) They bag with them. (Pause) [30] This doesn't show any direct means for bagging that I can see. (Pause) This is intended mostly to be a cleaning machine.

Q. Does it have any means of vibrating the platform for supporting the bags? A. No.

Mr. Franklin: All right.

Q. (By Mr. Franklin): Now, I will show you

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

the patent to J. Broussard, #1,014,444, (handing witness document) "Bag Filling Machine."

(Addressing the Notary): Will you mark that as "Plaintiff's Exhibit #7 for Identification?"

(The said document was thereupon marked "Plaintiff's Exhibit #7".) [31]

Q. (By Mr. Franklin): How many bags does that machine fill? (Referring to "Plaintiff's Exhibit #7 for Identification.")

A. (Perusing document): Two.

Q. When you fill the two, do you have to take them off and put new ones on, unfilled?

A. Yes, they have to be removed and new ones put in their place.

Q. Two at a time? A. Yes.

Q. Does that machine have a platform including an elongated container station at the end thereof?

A. No.

Q. In which a plurality of bags are supported in the container stations? A. No.

Q. I will hand you the patent to Naeher No. 1,719,124 "Bag Filling Machine."

(Mr. Franklin hands the document to the Notary.)

The Notary: You are asking that this be marked "Plaintiff's Exhibit No. 8 for Identification"?

Mr. Franklin: Yes.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

The Notary: This document which you have just handed me?

Mr. Franklin: Yes.

(The said document was thereupon marked by the Notary "Plaintiff's Exhibit No. 8 for Identification".)

Q. (By Mr. Franklin): Does that machine have a platform including an elongated surface with container stations from the ends thereof, in which stations are supported bags to be filled? [32]

A. (Perusing patent): No.

Q. (By Mr. Franklin): Well, I will hand you the British patent to Daniel Belcher, No. 397,679 (handing witness document), and ask you to examine it.

Excuse me. First I will ask the Notary to mark that for Plaintiff's Exhibit #9 for Identification.

(The said document was thereupon marked by the Notary for "Plaintiff's Exhibit #9 for Identification.") [32-a]

Q. (By Mr. Franklin): Does that have a platform on it? (referring to "Plaintiff's Exhibit #9")

A. (Perusing patent): No.

Q. How are the bags handled on that machine?

A. (Examining document): From the drawings, I would say that the bags are brought to the machine filled. They enter the machine and are sized by passing between the belts "50" and passing from

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

there (indicating) onto a damping table which packs the material into the sack.

Q. (By Mr. Franklin): Are those bags stationary on the table, or are they movable?

A. No, they move along all the time.

Q. What moves them along?

A. The friction of the belts "50."

Q. The belts "50", what is that?

The Witness: The friction of the belts "50" here. (indicating) [33]

Q. Just state what that belt is and what it does.

A. Well there is a belt "42" on the bottom and the belts "50" are on the two sides and as the bag is placed between these belts "50" it rests on the belt "42" and it travels for a certain distance between these two belts resting on the lower belt. As it passes out of there, it has been sized to a certain size, then passes between two sideboards "19", a bottom board I would say rests on it (pause) or as it leaves the movable belt "42" it has an up and down motion which has the tendency to tamp the material so it will rest at the bottom of the sack.

Q. (By Mr. Franklin): "Up and down;" how is that?

A. (Perusing patent.) By means of a crank and a link fastened at the bottom of the table, near the center.

Q. Near the center of the board?

A. Yes.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. You say it moves the board up and down, in the center——

A. It moves the board up and down, like that (witness illustrates) so as to tamp the goods into the sack.

Q. Is that board vibrated by a longitudinal reciprocal motion? A. No, by vertical crank.

Mr. Franklin: All right. "By vertical crank."

Q. (By Mr. Franklin): During the operation of the machine, are those bags in motion on the machine, or are they [34] at rest?

A. No, they are moving, all the time.

Q. They are moving all the time through the machine? A. Yes, through the machine.

Q. Moving all the time through the machine?

A. Yes.

Q. Do you find a platform with elongated surface with container stations at the ends thereof?

A. (Witness nods head in the negative.)

Q. In that machine? A. No.

Q. Now, I will hand you the patent of Felix von den Wyngaert, a German patent, No. 69746—(handing witness document).

Mr. Huebner: Are you going to identify that?

Mr. Franklin: Yes. That's "Plaintiff's Exhibit 10 for identification."

(Addressing the Notary) Will you please mark it?

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

(The said document so handed to the Notary by counsel for the plaintiff was thereupon marked "Plaintiff's Exhibit 10 for identification.") [35]

Mr. Franklin: All right.

Q. (By Mr. Franklin): Is there a patform including an elongated surface, with container stations at the end thereof?

A. (Perusing patent.) No.

Q. Is there any means of vibrating the bag?

A. There is a crank means for oscillating a pad, which hits the bag on the side, the bag being hung from its neck.

Q. A "pad," what is that? Does it strike it?

A. It strikes the side of the bag.

Q. What does it do, beat it?

A. Yes, it beats the bag.

Q. I will hand you the patent of Peter Steimel, a German patent, No. 512780. (Handing witness document.)

Mr. Huebner: Are you going to have that marked, too? Are you going to identify it?

Mr. Franklin: Yes, that will be "Plaintiff's Exhibit 11 for identification."

(To the Notary): Will you mark it, please?

(The said document was thereupon marked by the Notary "Plaintiff's Exhibit 11 for identification.") [36]

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Mr. Franklin (Addressing the Notary): Please mark these for purposes of identification.

(The said documents were marked respectively "Plaintiff's Exhibit No. 11 for identification and Plaintiff's Exhibit No. 12 for identification.") [36-B]

Q. (By Mr. Franklin): Have you studied that patent, Mr. Gearing? A. Yes.

Q. How many bags does that handle at a time?

A. One.

Q. Does it have a platform, including an elongated surface with container stations at the ends thereof? A. (Examining patent): No.

Q. Is the bag vibrated in any way?

A. The bag is hung from a hopper and struck by pads on the side.

Mr. Franklin: All right. Now, we will take up the F. J. Ernst patent again, "Plaintiff's Exhibit 1" for identification, and referring to that part indicated—(handing witness document).

A. (Perusing patent): "52"?

Q. (Examining document): Yes, "52". State the purpose of that board (indicating)?

A. It's a baffle to control the flow of potatoes. (Perusing document) Or like articles into the bags.

Q. How is it mounted on the machine?

A. It is mounted on two long rods, which run the length of the machine (pause) so that it is

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

loosely slidable from one end of the machine to the other.

Q. Does it have a lock for locking it into any position? [37] A. (Examining patent): No.

Q. And did you state the purpose of it?

A. It's for controlling the flow of the potatoes into any given bag.

Q. It directs the potatoes into any given bag?

A. Yes.

Mr. Franklin: All right.

Q. Now, you say it is adjustable along the rods?

A. It is movable along the rods.

Q. Now, when the potatoes strike against it, do they move it? A. No.

Q. How is it held in position?

A. The sleeves have a natural clutching action which would have a tendency to make it stay wherever it's put.

Q. Do you mean by that a binding action?

A. A binding action.

Q. By striking against the plate?

A. By the potatoes striking against the plate it gives it a binding action.

Q. Does that tend to move the sleeves out of parallel, on which the sleeves are mounted?

A. It does tend to move them (pause) and gives them that gripping action.

Q. In the event of a lot of potatoes piling up on [38] there, in case it should be moved out of

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

position for one reason or another, what would the operator of the machine do in a case like that?

A. Draw it back into place. (Witness indicates.)

Mr. Franklin: Yes.

Q. Does it—(To reporter)—strike that out.

Does the operator move that baffle plate "52" from one place to another?

A. He moves it from station to station as the bag is filled.

Q. As one bag is filled, he moves it to the next station to fill the next bag?

A. (Witness nods head in the affirmative.)

Mr. Huebner (Addressing witness): Keep your voice up. The reporter can't get your nod.

Q. (By Mr. Franklin): As one bag is filled he moves it to the next station to fill the next bag; is that right? A. That's right.

Mr. Franklin (Examining document): Let's see, I think there were four new patents set up. (Addressing counsel.) Weren't there?

Mr. Huebner (Addressing reporter): This is off the record.

(Discussion.)

Mr. Franklin (After discussion): All right.

Q. Now, I will hand you the patent to Charles C. Blank, No. 805625, dated July 8, 1905. (Handing witness document.) Does that patent have a plate extending out to an acute angle connected at its

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

ends to loose sleeves on a pair of rods or bars so that the plate is positioned obliquely across the belt for the purpose of manual movement over the belt?

A. (Examining patent): I don't think it has a pair of rods (pause) it had a web-shaped member that is guided by a rod and pulled along by a chain.

Q. Is it mounted on rods for manual movement from one station to another and allowed to rest?

A. No, it's supposed to move continuously.

Q. If it moves continuously, would it be possible to hold it at rest for the purpose of filling each bag independently?

A. I don't think it is intended for filling bags.

Q. Well, what does it do?

A. It receives the crackers which properly come from traveling ovens (pause); they move continuously (pause) directly from belt "3" (pause) if it comes from the rail it would be (pause) it scatters them the whole length of the machine (pause). The crackers would then travel along the belt "2" and meet the shearer plate (pause) we might call it such "11" (pause) which scatters them to each side onto the tables "5," (pause) and they [40] are prevented from falling to the floor by rails "7" (pause); girls stand at the side of the table and pack them into the boxes right there at the side.

Q. You say it scatters them all along the whole length of the machine?

A. Yes, it scatters them all along the whole

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

length of the machine (pause); I say that because I have seen tons of them done.

Q. It doesn't put them in the bags, then?

A. No, the girls pick them up and pack them.

Mr. Franklin: All right.

Q. I will hand you the patent of S. W. True, No. 1,369,502, which states:

"The present invention relates to improvements in conveyor systems, and while the invention is especially designed for handling packages or boxes of fruit, it will readily be understood that other articles or material may be handled or conveyed by the endless conveyor which forms the subject matter of this invention."

Mr. Huebner (Addressing counsel): Excuse me, is that patent marked yet for identification?

Mr. Franklin (Addressing reporter): Will you mark it, please?

(The said document was thereupon marked "Plaintiff's Exhibit 13 for identification.")

The Notary: That, gentlemen, is "Plaintiff's Exhibit 13" for identification, S. W. True, No. 1369502.

Mr. Huebner (Addressing the Notary): Thank you.

(The witness is studying a document.)

Mr. Huebner: Pardon me, is there a question pending?

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

The Notary: There is no question pending, gentlemen.

Mr. Franklin: May I have that.

(Addressing the witness): I am not going into all that.

(The witness hands Mr. Franklin the document which the witness has been perusing.)

Q. (By Mr. Franklin): Now, referring to Figure 7, there is a diagonal plate "36" which is held in position by what is called "brackets" Figure 37. (Handing witness documents.)

Do you see it?

A. (Examining patent): Yes.

Q. That machine handles packages and boxes of fruit, as stated there; would it be necessary to lock that diagonal plate into position to divert bags of vegetables and fruit from one side to the other?

A. (Perusing patent): Yes.

Q. Why.

A. Because in that case they would be loading packages anywhere from fifty to one hundred pounds.

Q. Does the patent and specifications provide anywhere, [42] if that plate is locked into position, to divert the boxes of fruit to one side?

A. (Examining patent): The arm is arranged obliquely across the belt in brackets "37," forming part of frames "8" and "8'" and for supporting

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

these endless belts and the guides, or switch members, are of sufficient strength and proper material to withstand the impact of a box being carried on the belt.

Q. If it were not locked, would it be moved out of position by boxes of fruit striking against it?

A. Yes.

Q. Does the patent describe any locking means for locking that plate into its diagonal position, the parts "37," brackets?

A. Uh-huh. (Witness examines patent.)

(Continuing): Well, the brackets "37" are parts of the frame, and therefore must be integral with it, and I would judge they are placed, as this patent states, (pause) at predetermined places (pause) and therefore locked into position.

Q. Well, the patent does describe the plate as portable, but does it describe how it may be taken from one position and put into another?

A. The guide arm or switch arm is portable and may be (pause) at any convenient point, for the purpose of transferring boxes from one belt to another belt. [43]

Q. What page and what line were you reading from, Mr. Gearing?

A. I was reading from page 95 (pause) to 100.

The Notary: Beginning at page 95 and ending at 100, Mr. Gearing?

The Witness: Yes, page 95 to 100.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. (By Mr. Franklin): But does it describe how those brackets may be held against movement with boxes of fruit striking against the plate?

A. (Examining the patent): The brackets "37" forming parts of the frames (pause) they are part of the frames (pause), they are built right into the frames and the guide handle drops between the brackets "37"—

Q. So, would you say the brackets would have to be stationary on the frame as you move the plate from one station to another?

A. (Examining patent): Yes.

Mr. Franklin: All right.

(To witness): Let me see that patent just a minute.

(The witness hands counsel document.)

Q. (By Mr. Franklin): On page 2, there is a statement, Column 2, beginning on line 75, "This arm is arranged obliquely across the belt 4 in brackets "37," forming parts of the frames "8" and "8" for supporting these endless belts and the guides or switch members are of sufficient strength and of the proper material to withstand the [44] impact of a box being carried on the belt 4. Thus, as the first box encounters the guide arm "36" it is shunted obliquely toward the belt "35" traveling in the same direction as the belt 4—Would you say that construction is necessary where it states that the guides are of sufficient strength and of proper

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

material to withstand the impact of the boxes carried on the belt?

A. (Witness nods head.)

Mr. Huebner (Addressing the witness): Speak up so the reporter can get it.

The Witness: No.

Q. (By Mr. Franklin): Now, we will take the C. MacBeth patent, No. 1465619, conveyor for vulcanizing presses. (Handing witness document.)

Is that a bagging machine?

A. (Examining patent): It's a vulcanizing press.

Mr. Franklin: All right.

Q. For vulcanizing—— A. ——tires.

Q. ——automobile tires? A. Yes.

Q. Rubber tires? A. Yes.

Q. How are the tires put into the press?

A. They travel along the tracks "B" being pulled by the chain (pause) I am looking for a number (pause)—— [45]

The Witness (Addressing the Notary): Will you let me have my answer?

(Last answer read by the reporter as follows:

"They travel along the tracks 'B' being pulled by the chain——")

The Witness: By the chain "B-1."

Q. By Mr. Franklin: Capital "B-1?"

A. Yes. The chain has at certain intervals an

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

upstanding gear, "B-2," that contacts the mold as it is drawn along the track and it draws it along the track until it reaches the chamber in which the mold is to be placed to be vulcanized.

Q. "In which the mold is to be placed to be vulcanized?"

A. Yes. The mold then slides down the guider into the vulcanizing chamber and the head is lowered into the chamber and the tires locked (pause) and the tires vulcanized.

Q. When you say the "mold;" where is that?

A. (Perusing patent): The mold is "F." There it is (indicating).

(Mr. Franklin and the witness are perusing the patent.)

Q. Oh, the mold! With the tire in the mold?

A. With the tire in the mold, yes.

Q. The mold with the tire in it is conveyed along the conveyor?

A. Along the conveyor (pause) yes. [46]

Q. Thence to a press! How is it delivered to the press?

A. It travels over an apron (pause). When it reaches the press. (Examining document.) It slides along (pause) down into the press.

Q. Is that apron adjustable along the conveyor?

A. No, I would say not (pause) because if you

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

move the apron you would have to move the press and you don't move the apron very often.

Q. There is only one press?

A. Only one press shown here.

Mr. Huebner: Has that been identified?

Mr. Franklin (Addressing the Notary): Make that "Plaintiff's Exhibit 14" for identification.

(The said document was thereupon marked by the Notary "Plaintiff's Exhibit 14" for identification.) [47]

Mr. Franklin: Now, we will take the patent of P. A. Paisley, No. 1,818,427, (Addressing the Notary). And that will be "Plaintiff's Exhibit 15" for identification. Will you mark it.

(The said document was thereupon marked by the Notary "Plaintiff's Exhibit 15" for identification, and the same appears in the following words and figures, to-wit:) [48]

Q. (By Mr. Franklin): State, generally, what that patent shows. (Handing witness document.)

A. (Perusing document): This is a mine-loading apparatus.

Mr. Franklin: Yes.

Q. And it loads what?

A. Coal or ore of any kind that may come from a mine.

Q. And loads it into what?

A. Loads it into mine cars (pause) or it could

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

load it into freight cars (pause) if you had freight cars (pause) if you had the freight cars there.

Q. Does it have a baffle for the purpose of converting coal into the conveyor?

A. It has a long conveyor belt that passes the coal from the top of the cars and then it has a web-shaped shear plate that is pulled along and then tied into different positions to allow the coal to fill each individual car at a time and as each car is loaded, it is then moved into the next car (pause) and the next car is loaded the same way.

Q. Is that so-called baffle or shearer loosely mounted on rods, to be moved along on rods, or other manual means?

A. It rests on rails which form part of the framework (pause) on the conveyor belt. [49]

Q. Does it have to be locked? A. Yes.

Q. Into its various positions for the purpose of loading coal into the car? A. Yes.

Q. If it weren't locked, what would happen to it?

A. It would be shoved out of place.

Q. Let me take that one.

(The witness hands counsel "Plaintiff's Exhibit 15" for identification.)

Mr. Franklin: Are you willing to stipulate that so far as that shows on your machine, it says a "Central open locus" on one end?

Mr. Huebner: No, we won't stipulate to language like that.

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

The Notary: Gentlemen, is this for the record now.

Mr. Huebner: No, this is off the record.

(Discussion.)

Mr. Franklin: What will you stipulate to?

Mr. Huebner: I do not know what we will stipulate to.

(Addressing the Notary): This is also off the record.

(Discussion.)

Q. (By Mr. Franklin): Well, I will ask you, Mr. Gearing, to take this duplicate of one of the interrogatory exhibits 3-3, and I will ask you, if we took this [50] vibratory mechanism out of the center of the machine there, which is connected to the jigger ends of the jigger boards and the vibratory mechanism connected at one end of those jigger boards and the two jigger boards connected at their inner ends, so that the crank connected at one end of the jigger board would vibrate or reciprocate the two jigger boards as a unit; if such a construction like that were operated, would there be any difference in the mode of operation of that construction and the construction of the parts and the results accomplished, as compared to Exhibit 3, with the vibration mechanism connected in the center? A. No.

Mr. Huebner: Just a minute. The witness an-

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

swered too rapidly. I would like, first of all, to have the particular photographic print referred to by Mr. Franklin and Mr. Gearing in connection with the last question, marked for identification, because there are two exhibits "3-3's" in the interrogatories and that should be specific as to what exhibit is referred to. And then I want to interpose my objection to the question, after the question is repeated, and in that connection I want to move to strike out the answer to the last question.

Mr. Franklin (Examining documents): There are two Exhibits 3-3. I referred to the exhibit which had reference to the full length of the machine. This (indicating) doesn't do it; this (indicating) only shows a part. [52]

(Counsel peruse exhibits.)

Mr. Franklin: Well, for the purpose of clarification, I will have this exhibit "3"—Interrogatory Exhibit 3, marked by the reporter here taking this deposition, as "Deposition Exhibit."

(Addressing the Notary): Will you please mark it.

(The said document was thereupon marked "Deposition Exhibit" and the same appears as "Plaintiff's Exhibit 16" for identification.)

Mr. Huebner: Now that the photograph has been marked for identification to which the witness referred in answering before, I had time to make

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

an objection, I objected to the question, and I move to strike out the answer on the ground that the question was leading; it was ambiguous; it was irrelevant and immaterial, and is also assumes facts not in evidence.

Mr. Franklin: The questions involved defendant's answers to interrogatories which are not in evidence at the present time but will be introduced in evidence at the trial.

I will ask another question:

Q. (By Mr. Franklin): Would it make any difference in the operation and result of the machine if the vibrating mechanism connected at the inner ends with two jigger boards connected at the outer end and the two jigger boards connected together at their inner ends? A. No.

Mr. Franklin (Addressing counsel): I think that will be all, if you want to cross-examine now.

Mr. Huebner: It's four o'clock now.

Mr. Franklin: Do you want to take a little recess?

Mr. Huebner: I think it would be well to take a short recess.

The Notary: You desire to let the record show that it is stipulated that a ten-minute recess may be taken; so [53] stipulated, gentlemen?

Mr. Franklin: Yes.

Mr. Huebner: So stipulated.

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

(Whereupon a ten-minute recess was duly
had and taken.)

Cross-Examination

By Mr. Huebner:

Q. Mr. Gearing, as I understand it, you presume to qualify in this case as a patent expert on behalf of the plaintiff; what is your definition of a "patent expert?"

A. One who has a knowledge of patents (pause) understands machinery and its construction and building and who could take a patent and from the patent build a machine.

Q. Do you deem it essential that a patent expert should have a practical knowledge of the art to which he directs his attention? A. I do.

Q. I presume you are fairly familiar with the art involved in the two patents in suit?

A. Yes.

Q. Will you relate what practical experience you have had in this field?

A. Well, I designed from the bottom of the roof the Sparklett's Water Corporation Building, which has a lot of conveying machinery; a special apparatus for filling bottles and so forth. I designed mining machinery where conveyor machinery is used. In many instances and over many years I designed [54] concentrating tables which have to have vibrating motions, generally speaking. I de-

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

signed oil well machinery where we use not so many conveyors, but where we use hauling cables and (pause) conveyor apparatus of different kinds. I have designed printing presses in which it is a matter of conveying paper from one place to another for the purpose of the handling of it. I, four years ago, redesigned machines for processing paper for bankbooks, so I eliminated 17 girls and 3 men, doing the work with one girl, so (pause) I think that speaks as to my ability (pause) knowledge of machinery and how it should be built.

Q. When did you build this Sparklett's machine?

A. You mean the machinery for the Sparklett's Water Corporation Building?

Q. Yes.

A. Oh, I presume it must be twenty years.

Q. Approximately twenty years ago?

A. Yes.

Q. When, as you say, was it when you designed the mining machinery?

A. Well, I am doing that from time to time (pause) for the Cottrell Engineering Company.

Q. How far back in years did you do that work?

A. Fifteen or seventeen.

Q. Fifteen or seventeen years ago?

A. 1900 to 1915 (pause) 1900 to 1917. [55]

Q. And when did you first work on oil well machinery? A. 1912.

Q. I take it then from what you say, for twenty

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

years back you had a good deal of experience in designing and installing machinery? A. Yes.

Q. Now, what is the actual, practical experience you have had in connection with potato sacking or packing devices?

A. I never had any actual experience with the packing or sacking of potatoes.

Q. You haven't designed any sacking device for potatoes?

A. (Witness nods head in the negative.)

Q. You haven't designed any jigger device for packing potatoes? A. No.

Q. I presume, however, you have seen such machines in operation? A. Yes.

Q. And when did you first engage in their construction; when did you first engage in their observation?

A. That's pretty hard to say (pause) I am around so many plants, so many times, I observe everything going on.

Q. Do I understand you to be of the opinion, Mr. Gearing, [56] that the general machinery experience that you have had in connection with the Sparklett's installation and the mining machinery and the oil well equipment are all related to the case involved in the two Ernst patents in suit?

A. Yes, I would say they are.

Q. Now, as to the machinery you installed in years back, let us say going from 1915 to 1930, let

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

us take a span of fifteen years; in the case of the equipment that you installed and designed, were they conveyor systems? A. Yes.

Q. Did those systems include endless belts?

A. Yes.

Q. And the belts were constructed for the purpose of conveying potatoes or other objects from the surface of the belts? A. They were.

Q. Did those machines involve any diverter or shearer plates? A. They did.

Q. Did any of those machines which you designed during any of that fifteen-year period, which we have selected for purposes of illustration, involve vibratory or shaking of material being packed?

A. Not being packed but they did involve vibratory machines for shaking material. [57]

Q. And the particular ones you have in mind were what?

A. Mining machinery for concentrating tables.

Q. And in those concentrating tables, the device or devices for doing the vibrating, I presume, consisted of excentrics or fly wheels, with off-center cranks connected with pitmans?

A. No, they were mostly done with out-of-balance pulleys.

Q. Well, as a patent expert I presume you have heard the phrase "crowded art?" A. I have.

Q. What is your understanding of the phrase "crowded art?"

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

A. Well, it is an art in which there have been probably so many devices developed that your field may be somewhat limited.

Q. Accepting your definition for the purpose of the next question, the art in which the two patents, Ernst patents in suit here, namely: F. J. Ernst, No. 2,288,159 and E. A. Ernst, Reissue 22,740, are in a crowded art, are they not?

A. When you speak generally, yes, but not in the potato field.

Q. Well, your thought in that connection is that the principle involved in the two Ernst suits have not [58] been directly applied to the packaging of potatoes; is that it?

A. Or similar articles.

Q. The two general principles which are involved in the Ernst patents in suit here, were, however, involved in the manufacture and operation of other packaging equipment?

A. The general principle of vibration, yes.

Q. And the general principle of diverting by means of a shear plate, shoving articles off an endless belt, that was also very old, wasn't it?

A. For package of materials, yes.

Q. Well, now, what would you say as an expert, Mr. Gearing, is new in the F. J. Ernst patent in suit, No. 2,288,159, a copy of which is marked for identification "Plaintiff's Exhibit 1?" And I ask that question of you as an expert for the purpose of

Plaintiff's Exhibit 16.—(Continued)

(Deposition of Harry Gearing.)

having you give us your opinion, and in answering the question do not refer to the names of the patent, but give your own opinion of what you think is new in this disclosure.

A. (Perusing Plaintiff's Exhibit 1 for identification): Well, I think what is new in the disclosure is the convenient arrangement of the sacks receiving the potatoes (pause) the means by which the potatoes are forced to compact themselves in the sack and means of converting them easily from one sack to another. [59]

Q. And that is all disclosed in the Ernst patent in suit, No. 2,288,159, which has been marked for the purposes of identification "Plaintiff's Exhibit 1?"

(Addressing the Notary): You had better add to my question "is it?"; the inflection doesn't show on the paper!

A. (Perusing "Plaintiff's Exhibit 1" for identification): I can't say it shows the vibratory means there (indicating)—(pause)—no, it doesn't show the vibratory means there.

Mr. Huebner: Well, now, will you please read, Mr. Reporter, Mr. Gearing's answer to my last question.

(Last answer read by the reporter.)

Mr. Huebner (Addressing Reporter): Thank you.

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Q. (By Mr. Huebner): Now, you are amending your answer as to the question of what is new in this "Plaintiff's Exhibit 1" for identification, to eliminate from your answer the vibratory means and with it the so-called means of compacting the potatoes into the sacks? A. Yes.

Q. Now, will you please, after reconsidering this answer to the question so that the record will be clean, what, in your opinion, is new in the drawing and description and in claims of the Ernst patent No. 2,288,159, in suit, "Plaintiff's Exhibit 1" for identification?

A. (Examining document): Well, after reading the specifications of the patent the sack-holding means to [60] which the mouth of the sack is attached, is hinged on a rod and can be shaken by the operator to compact the potatoes.

Q. That is one of the new features in this patent, is it?

A. In this one here (pause), yes. And the shearer plate for guiding the potatoes into each individual sack, as one or the other may be filled.

Q. The shearer plate, as a broad element, is not new in the Ernst patent, is it?

A. It is new with reference to items such as potatoes and things like that, it is not new with references to packages.

Q. And it is not new with reference to mining equipment, is it?

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

A. No, we don't use the shearer plates in mining equipment.

Q. Well, you use angular diverting boards, do you not? A. No.

Q. Now, what, specifically, is new in the shearer plate arrangement in Ernst patent in suit, No. 2,288,159, "Plaintiff's Exhibit 1" for identification, besides its use for the purpose of packaging potatoes, as part of the prior art, I mean by that, applying the prior art to Ernst patent in suit here "Plaintiff's Exhibit 1" for identification? [61]

A. The Ernst shearer plate can be readily moved to any position along the belt, while most shear plates are moved and bolted into a definite position, because they have to stand considerable shock.

Q. Well, is it a fact that the Ernst shearer plate is broadly movable, longitudinally along the belt, or is it new by reason of the specific detail by which he, Ernst, mounts the plate to enable it to be moved?

A. Well, the fact is that he would have to have a shearer plate that he could readily move, therefore, he would have to devise some means to readily move it, but when left to itself it would remain largely at rest.

Mr. Huebner: I don't think you got quite the significance of the question, and I would like you to reconsider it and answer it again. I will ask you another question:

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. I will ask you this question, Mr. Gearing: Is it your opinion that the feature of the Ernst shearer plate of Patent No. 2,288,159, "Exhibit 1" for identification, is movable, that that contributes to the novelty, or is the novelty in your opinion in the specific details by which Mr. Ernst mounted this shearer plate and rendered it movable?

A. I would say both. (Pause)

(Witness studying patent): In the fact that he made the construction so he could move it a little or great (pause) as shown in the specifications (pause) as desired; [62] and he made the construction so that it was very, very simple and so that it could be moved by hand very readily, but on coming to rest it would, being contacted by the potatoes in an uneven manner (pause) it would automatically hold itself in position.

Q. Ernst didn't use a latch on this assembly plate, did he? A. No.

Q. He accomplished what you call a clutching or binding action—I believe that is what you said?

A. Yes.

Q. (Continuing): —by the use of sleeves, slidable along the parallel rods? A. Right.

Q. Is that right? A. Right.

Q. Now, in the Ernst patent, "Plaintiff's Exhibit 1" for identification, upon what are the potato sacks resting?

A. They are resting on platform "51."

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. Is that platform "51" stationary or mounted, for vibration or oscillation?

A. It's stationary (pause) it's mounted so it could be raised up and down depending on the length of the sacks but it doesn't vibrate.

Q. Now, with your background of engineering experience, [63] if you were shown this Ernst patent, "Plaintiff's Exhibit 1" for identification, with this stationary platform "51" and told it would be desirable to shake the sacks of potatoes while they were being filled, what would you as an engineer or one skilled in this art, do to accomplish that purpose?

A. I would work out some means for vibration.

Q. Now, in working out some means for vibration, would it be necessary, obviously, to suspend the platform "51" by a flexible or yieldable suspension means?

A. Yes.

Q. Would it also be obviously necessary to couple with the platform some form of excentric or pitman or crank or off-center pulleys in order to impart a vibratory motion to the platform?

A. Yes.

Q. Now, taking into consideration those modifications included in the last two questions that I have asked you, Mr. Gearing, they would not present a difficulty or insurmountable problem to you as an engineer with your background, would they?

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

A. Probably not a great deal, because of my vast and wide experience.

Q. By the way, where did you observe potato sacking machines of the character shown in the two patents in suit, in operation? [64]

A. I didn't see any actual potato sacking machines.

Q. You haven't seen any machines then which were purposed to have been built under the two Ernst patents in suit? A. No.

Q. Now, Mr. Gearing, if this Ernst patent, "Plaintiff's Exhibit 1" for identification, were exhibited to you, and you were retained as an engineer and a man skilled in the art to design a shearer plate mounting consisting of the sleeves and the parts, slidable along parallel rods, as shown in the drawing, what are some of the alternatives that you, as an experienced man, would adopt?

A. Well, I might hold it with set screws (pause) or I might put a latch of some kind on (pause) but if I put a latch on, that would, to some extent, predetermine where it would stay (pause) but all that would add to complication and expensive machinery.

Q. What alternatives might occur to you as an experienced man in this art, by way of substitution of the sleeves themselves?

A. The only thing I would say would probably be a U section that would be dropped over the rods (pause) but the danger of that would be that the

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

potatoes would force it up (pause) so that that wouldn't be very satisfactory. [65]

Q. What would you think of substituting a trolley on a rail or even on a rod in lieu of the sleeves shown there in the patent?

A. It could be substituted but it would be far more expensive.

Q. Have you seen in the prior art patents, any such substitute?

A. In one of them it's specifically stated (pause) it states that there are stations there which form part of the framework (pause) and then the shearer plate is simply picked up and dropped into stations (pause) but they have to be put in predetermined places in the stations and not where you wish. [66]

Q. Have you seen any places in the Prior Art Patents where the shearer blade is shifted along a moving belt for selective location by means of being mounted on a dolly or a wheeled carriage or framework?

A. No, I don't remember (pause). I haven't.

Q. Have you seen any such mechanism in your practical experience in the field?

A. Well, they use something similar to that in connection with cameras, but that is only to guarantee it shall be capable of being moved about (pause), but it has tracking equipment or a gear so that one can't be moved any faster than another.

Q. In view of your general knowledge with a

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

wheeled carriage or framework moveable along a rod or a rail or a track would it be equivalent in general function to the sleeve mounting in the Ernst patent, 'plaintiff's Exhibit No. 1 for identification'?

A. Yes.

Q. And in that case, it would only be necessary to utilize some sort of a latch or a catch to hold the plate at some selected position: is that right?

A. That's right.

Q. Well, if you were shown a Prior Art patent which disclosed a shear plate carried by wheels or trolley pulleys on a rod or a track for the purpose of supporting and enabling positioning of a shear plate, what then would [67] you say as an expert is novel in the Ernest device "Plaintiffs Exhibit No. 1"?

A. The very simplicity of it.

Q. It is your opinion then that the simplicity sleeve construction; illustrated in "Plaintiff's Exhibit No. 1 for identification" would impart the novelty, in the Ernest patent, in suit?

(The witness nods head in the affirmative.)

Mr. Huebner: It is quite late, I do not know how long you want to run?

Mr. Franklin: How long will it take you to complete your examination?

Mr. Huebner: A couple of hours. We might discuss it a minute.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

(Addressing the reporter): This is off the record now.

(Discussion.)

Q. (By Mr. Heubner): I will get back on the record and indicate the next two questions, and then maybe you will want to get into a huddle on it.

(Addressing counsel): Have you got those two German patents there?

Mr. Franklin (Addressing his file clerk): I think so.

(Mr. Franklin hands to Mr. Huebner a document.)

Mr. Huebner: Thank you. (Examining documents.) I think they were marked.

Mr. Franklin: I think they are. [68]

(Mr. Huebner hands Notary two documents which the Notary marks for Mr. Huebner respectively "Plaintiff's Exhibit No. 10 for identification" and "Plaintiff's Exhibit No. 11 for identification.")

Q. (By Mr. Huebner): Now, Mr. Gearing, directing your attention to Plaintiff's Exhibit 10 for identification, the German Patent No. 69746 and also Plaintiff's Exhibit 11 for identification, a German Patent, No. 512780.

(Handing witness documents.)

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

These have no translations attached to them, have they? A. (Perusing documents) No.

Q. I presume you read German? A. No.

Q. Well, have you had these two patents last referred to translated for your benefit?

A. No, sir.

Q. You are not aware then of what is said in the specifications to these two German patents?

A. I am not.

Q. And your testimony with respect to those German patents then was based entirely on your observation and interpretation of the drawings contained in the patents? A. That is correct.

Q. Now, Mr. Gearing, do you consider that the Ernest patent 2,288,159 "Plaintiff's Exhibit No. 1 for identification", is a complicated patent? [69]

A. No, I can't say I do.

Q. Is it your opinion that any intelligent person reading the specifications and making a reference to the drawings would be able to understand the construction and the mode of operation of the device portrayed therein?

A. I would say yes, (Pause) that's the way we are supposed to make patent drawings in patents.

Q. My point was: Is it necessary, Mr. Gearing, for a person to be skilled in the particular art in order to understand the construction and mode of operation of the patent if one examines the drawings and specifications?

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

A. I think if he is qualified as a mechanic he ought to be able to read drawings and build the machines from them.

Q. Now, for the moment let us forget about the actual building of the machine and address ourselves to only an understanding of what the machine is supposed to be and how it is supposed to operate; would it take a person skilled in the art to understand it if they had before them the Ernst patent?

A. He would have to be skilled in the mechanical arts, yes.

Q. Now, you have testified as an expert in patent cases in Federal Court, have you not?

A. I have, yes, sir.

Q. Would you say that the average United States [70] District Court Judge would be able from an examination of this Ernst patent in suit "Plaintiff's Exhibit No. 1 for identification" to discern what it is intended to disclose?

A. If he had the aid of an expert (pause), if he were a mechanic (pause) I think he would probably be able to understand it by his own examination.

Q. But you do not think he would be able to do it without the aid of an expert?

A. I think in many cases he would bog down on that.

Q. So that in your opinion you think it would depend on the engineering or mechanical knowledge that a Judge would have?

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

(Witness nods head in the affirmative.)

Q. Some have more than others?

No response.

Q. Have you testified before Judge Yankwich?

A. I have.

Q. Do you think he would require for an understanding of this Ernst patent in suit, "Plaintiff's Exhibit No. 1 for identification," your explanation, or do you think that he would be able to understand it by his own examination of the patent?

A. I think he would probably be able to understand it by his own examination (pause). I think he has a mechanical mind.

Q. Would you say the same, would your answer be the [71] same with respect to the Ernst patent in suit "Plaintiffs Exhibit No. 2 for identification?"

A. With reference to Judge Yankwich?

Mr. Huebner: Yes.

The Witness: Yes.

Q. (By Mr. Huebner): Now, Mr. Gearing, directing your attention to reissue No. 22, Ernst Patent in suit, "Plaintiff's Exhibit No. 2 for identification" what, in your opinion, taking into consideration your knowledge of the prior art, is new in this patent?

(Handing witness document.)

A. (Perusing documents): The adaptation of old principles to a new art.

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Q. Now, what are the old principles and what is the new art?

A. The new art, is the sacking of potatoes.

Q. And what are the old principles?

A. The old principles, are motors (pause) or motor power (pause) and proper gearing, and so forth, to make operative a machine to produce the results desired in the potato packing machine.

Q. What are the new results desired?

A. For packing the potatoes down so that they will form a uniform mass.

Q. How is that accomplished by the Ernest Patent?

A. By shaking the sack so that the potatoes are forced [72] to settle down as closely to the bottom as possible.

Q. What means is disclosed for accomplishing that function?

A. The board on which the sacks rest (pause) which is hung so that it may be vibrated by means for (pause) vibrating the board.

Q. Well, as broadly as you have stated the structure in your answer to the last question, is it your opinion that such a broad disclosure constitutes the novelty in this patent?

A. It is a case of using (pause) it is the case of the use of old mechanism in a new place; that is what makes the invention possible.

Q. And the new place is a potato packing house

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

as distinguished from some other merchandising establishment? A. Yes.

Q. And that's all? A. And that's all.

Mr. Huebner (Addressing counsel): It's now half past five.

Mr. Franklin: Yes.

Mr. Huebner: In fact, a little past 5:30. I want to go through some of these prior patents, and I think it would be wise to adjourn, because it is going to drag a little bit. Would it be agreeable to go over to the next [73] morning?

(Addressing the reporter): This is off the record now.

(Discussion.)

Mr. Huebner: It is agreeable to come back here at 11:00 o'clock tomorrow morning?

Mr. Franklin: Yes.

Mr. Huebner: Then let us show on the record that by agreement the deposition is adjourned until tomorrow at 11:00 A. M., at the same place.

Mr. Franklin: I would like to keep these, they are the only ones I have and I want to study them; I will make them available to you and to the reporter.

Mr. Huebner: At Mr. Franklin's request we will stipulate that he may withdraw the plaintiff's exhibits which he has caused to have marked for purposes of identification; on the condition that he

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

will make them available to the Notary and reporter to be attached to the deposition.

(Thereupon an adjournment was duly had and taken until March 1st, 1949, at the hour of 11:00 o'clock a.m.) [74]

Los Angeles, California,

March 1, 1949, 11:00 o'Clock A.M.

Deposition Resumed Pursuant To Adjournment;

Present: Same As Before.

Mr. Huebner: I think we are ready to proceed.

Mr. Franklin: Yes.

The Notary: All present, same as before?

Mr. Huebner: Yes.

Cross Examination

(Continued)

By Mr. Huebner:

Q. Mr. Gearing—by the way, do you pronounce it “G-e-a-r-i-n-g” or “G-e-e-r-i-n-g”?

A. “G-e-a-r-i-n-g” (pause) you can't have machinery without gearing.

Mr. Huebner: Pretty good!

Q. (By Mr. Huebner): Are you associated in any other work, other than this case, with Mr. Franklin, attorney for the plaintiff?

A. No, he has offices with me, that's all (pause) we are entirely separate.

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Q. Is it your opinion that patents in the agricultural field generally which relate to the conveying and packaging of products are in an analagous art to the Ernst Patent in suit? [75]

(Addressing the reporter): Will you read the question for me?

(Last question read by the reporter.)

Mr. Huebner: I'm afraid that question is a little bit awkward! Mr. Reporter, make it read "are in an art analagous to the Ernest Patents in suit."

The Witness: Will you let me have it again?

(Question read by the reporter, as follows.)

"Q. Is it your opinion that patents in the agricultural field generally which relate to the conveying and packaging of products are in an art analagous to the Ernst Patents in suit?"

A. Yes, more or less.

Q. Now, Mr. Franklin asked you a number of questions about an elongated platform in some of these devices; what is an "elongated platform"?

A. Well, generally speaking, it's a platform which is of a length considerably greater than the width of the platform.

Q. Well, would you consider the platform 51 in Ernst Patent 2,288,159, to be an elongated platform?

A. (Examining document): 15 feet (pause) yes.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. Now, in that patent last referred to, is there any central open locus on the platform?

A. No.

Q. Are there any container stations on the [76] platform? A. Yes.

Q. Now, what would you do, what alteration would you put into effect to create on platform 51 a central open locus?

A. (Examining document): Well, I would either split the machine (pause) or, I think in this case I would add another machine to the side of it.

Q. You mean you would duplicate platform 51 and its associated elements? A. I would.

Q. Then you would have two machines, and what would you have between them?

A. A central location.

Mr. Huebner: All right.

Q. (By Mr. Huebner): You could also obtain a central open locus on platform 51 merely by eliminating the central container station, couldn't you?

A. You could, yes.

Q. Is it necessary in your opinion that an elongated platform—a container platform—should have a capacity to hold any particular number of bags or containers in order to be considered within the meaning of the term used in these patents, as an elongated platform?

A. Will you let me have that question again, please? [77]

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Mr. Huebner: Yes. Read the question, Mr. Reporter.

(Last question read by the reporter.)

A. Well, I would consider it necessary to have at least two or more.

Q. Now, is there any difference, from an engineering or mechanical standpoint, in having a platform in the form of a single plank that runs the full length of the machine or having two planks separated by a connection? A. No.

Q. What's the advantage, if any, in putting jiggling mechanism and its connection with the platform or platforms in the center of the apparatus instead of at one end?

A. In order to probably give more balance to the machine.

Q. Anything else?

A. It might speed the loading of the potato sacks (pause) because it could be fed from two directions.

Q. The prior art shows jiggling connections both centrally and at ends of elongated platforms, doesn't it?

Mr. Huebner (Points out to the witness a place in the document): As shown there (indicating), it reaches both ways?

A. No, I don't think it does (pause) I think the [78] only place where it shows that it is centrally located is in the plaintiff's patent.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. So far as you are concerned, the prior art that you are familiar with, and by that I refer to the patent's background, the jigglers were made at the ends of the platforms?

A. (Examining document): I wouldn't say positively, no. (Pause.) They are put where most convenient.

Q. It's a matter then of engineering design or selection as to where it should be placed; is that right?

A. It is always a compromise.

The Reporter (Addressing the witness): "Compromise"?

Mr. Huebner (Addressing the reporter): Some people call it "compromise"; some people call it "compromise"!

Q. (By Mr. Huebner): Now, will you refer please to the Stehlin Patent, No. 1,912,433, "Plaintiff's Exhibit No. 3 for identification," and state what would be involved there by the way of modification to give the structure in figures 1 and 2 the capacity to handle additional bags?

A. The placing of bag-holding means (pause) either more to the right or placing a certain number to the right and to the left of the vibrating means.

Q. Well, that's something that an engineer, given this patent, could do without any particular trouble, isn't [79] it, Mr. Gearing?

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

A. That would be possible, but the operating arrangements for feeding the bags would have to be very elaborate then.

Q. Would it involve anything greater than ordinary mechanical skill to put a similar unit at the left side of the drawing, figure 2? A. No.

Q. But you could use the same jiggling mechanism to operate the twin unit that is used to operate the one shown, could you not? A. You could.

Q. Now, I believe you made a point that the spring 44 in Stehlin gave a soft vibration, a soft vibratory action, rather than a harsh one?

A. That is correct.

Q. Now, the patent by Stehlin, does not require that as an arbitrary feature, does it?

A. I think he mentions somewhere in the patent (examining document) that he has that for damping effect. (Reading from document): "I preferably provide spring means for controlling and smoothing out or damping the otherwise violent action of the vibrating platform."

Q. You are reading from page two, line 50; is that right?

A. (Examining document): That is right. [80]

Q. So that would be his preference, but not necessarily the way it is manufactured. Will you look at page four, beginning on line 96, (reading): "Spring shock absorber for reducing the violence caused by sudden transition on movement may be

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

provided"—Directing your attention to that, isn't it your understanding that while the patentee might prefer the damping effect, the machine, within this comprehension, would operate without it?

A. As I said yesterday, the reason for the damping effect is to prevent the forming of caves in the bag where material of fine quantity was used.

Q. Now, if you were going to use the Stehlin machine for sacking potatoes, what would you do to get a desired sharper action?

A. I would do away with the dampener (pause); I would increase the strokes of the pitman and reduce its speed.

Q. Now, the pitman is connected directly to the movable platform, isn't it? A. Yes.

Q. And not connected to the spring?

A. (No response.)

Mr. Huebner: I just want to establish that as to the effect!

The Witness: That's correct.

Q. (By Mr. Huebner): Then the spring even in [S1] Stehlin wouldn't have any damping effect, would it, if there wasn't a looseness in the pitman connection?

A. Well, that would be because as the spring was compressed it would absorb the load.

Q. Well, that would be in case the pitman was slightly lowered so the spring would have that effect; isn't that a fact? A. No, not in any case.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. But if you would remove the spring, you would have a sharp action; Mr. Gearing, with your knowledge of the prior art that you have referred to under questioning by Mr. Franklin and your own engineering background, if you had been commissioned in 1940 to design and build a potato stacking machine which would properly sack potatoes and would divert potatoes into sacks from a moving belt, would you have been able to design one?

A. I probably would have been able to, but I would have discussed it with the people who were sacking potatoes at the time in an endeavor to find out their *modus operandi* (pause)—the *modus operandi* that they had (pause) and their reasons for doing different things.

Q. And based on that experience, you would have borrowed from your knowledge, from the sum of human knowledge up to that time, and you wouldn't have had any particular trouble in constructing a machine, would you?

A. No unreasonable trouble, no. [82]

Q. As an engineer, what would be your personal preference in designing a potato sacking machine, would it be to place the jiggling connection to the platform, as Mr. Ernst did, or put it at the end?

A. It would depend somewhat on the capacity of the plant where I was putting it. If it were a small plant I would probably make a small machine and put it at the end (pause); if it was a large

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

plant, I would probably put it at the center, and the purpose in that case of putting it in the center, would be to get a twin unit action (pause), a better machine and quicker operation.

Q. To increase capacity?

A. To increase capacity.

Q. That would be engineering preference and not necessarily involve or constitute an invention; that's right, isn't it?

Mr. Franklin: I object to it on the ground that the witness is not qualified on what constitutes invention! Mr. Gearing is merely a mechanical expert.

The Witness: Well, any improvement in machinery is invention! You probably would admit that in many cases where it has some simple improvement (pause) that it is an invention just the same.

Q. (By Mr. Huebner): Will you now refer to the Naecher Patent, No. 1,719,124, "Plaintiff's Exhibit No. 8 for identification"— [83]

Mr. Franklin (Addressing counsel): Which one is that?

Mr. Huebner: "Plaintiff's No. 8 for identification".

Q. (By Mr. Huebner): In your direct examination you referred to this patent as disclosing a platform; what element is that, by reference numeral? A. (Examining document): "12".

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. Now, that platform goes all the way across, doesn't it?

A. (Perusing "Plaintiff's Exhibit No. 8 for identification"): No, I think there are two separate pieces (pause) one on each side.

Q. (By Mr. Hueber): Well, Mr. Gearing, will you look at figure 2 of the drawing and you will note the reference numeral "12" is applied to the platform on both ends of it?

A. (Examining document): That is correct.

Q. And will you note also that there is a solid line crossed by the reference lead line 43 that goes entirely from one end to the other, with the element reference numeral "12"?

A. (Perusing document): That's correct.

Q. Then don't you want to revise your answer when I asked you whether the element 12 is a single platform that goes clear across the machine?

A. (Studying document): Well, it is very possible [84] that it does (pause), but the drawing is none too clear.

Q. Well, do not the platform or platforms 12, whichever way you look at it, have a provision for container stations?

(The witness is studying the document.)

Q. (By Mr. Huebner): Whichever way you look at it the platform or platforms 12 are provided with container stations for bags, aren't they?

(The witness nods head in the affirmative.)

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. And the platform or platforms 12 have a jiggling mechanism with a connection to the platform or platforms in the central region, don't they?

A. Yes.

Q. And the single jiggling mechanism has a single connection with a platform or platforms 12, doesn't it?

A. They have a double connection.

Q. Will you identify the connections?

A. 22.

Q. Now, you will find that in figure 4 of the drawings, won't you?

A. (Examining document): Figure three of the drawings.

Mr. Huebner (Examining document): Well, it is also in figure three of the drawing.

The Witness (Reexamining document): Figure three of the drawing. [85]

Q. Element 22 appears in only one position, doesn't it, Mr. Gearing?

A. Yes.

Q. You say that element 22 is in itself two connections?

A. Two connections.

Q. Well, where are the two connections to the opposite sections of the platform 12?

A. They are located on each side of the gears 29.

Q. Well, do they have a reference numeral?

A. (Examining document): 22 (pause), and larger ends (pause) an upper end surrounding shaft 21 (pause) and the lower end has a hole in it through which a pin 25 passes.

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Q. Then its your point that the connection is in duplicate, operating off of gear 29; is that right?

A. (Examining and studying document): That's correct.

Q. Will you look at figure 3?

A. Yes. (Perusing document.)

Q. What is element 28?

A. (Perusing document): Part of a frame.

Q. Well, isn't it a kind of a gear housing?

(No response.)

Mr. Huebner: In fact, I refer you to the patent, page 1, line 74, which refers to "gear case 28"; with that [86] reference do you care to correct your answer?

The Witness (Examining document): What line is that?

Mr. Huebner: Line 74.

The Witness (Reexamining document): Yes.

Q. (By Mr. Huebner): Well, 28 is a gear case or housing?

A. (Examining document): 28 is a gear case housing.

Q. And that's a unitary mechanism for the jiggling mechanism; isn't that right?

A. Correct.

Q. That is to say, a unitary mechanism——

A. ——Yes——

Q. ——a unitary mechanism for the jiggling mechanism? A. Yes.

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Q. Now, what problem would be involved (addressing the reporter) Strike that out.

Q. Now, does the platform or platforms 12 meet your definition of an elongated platform?

A. No.

Q. Why not?

A. Because they are about the same width as their lengths.

Q. There is capacity illustrated, however, for two bags, isn't there?

A. Yes. (Pause.) One on each side of the machine.

Q. Then if they don't meet your definition [87] exactly, what would have to be done to platform or platforms 12 to make them what you would consider elongated platforms?

A. They would have to be increased in their length outwardly from the center of the machine.

Q. If you did that then you would have an elongated platform, would you not, with container stations and a central open locus and a jiggling mechanism located in the open central locus with a connection in the platform for jiggling it at that central open locus?

A. Yes, you would.

Q. Then, Mr. Gearing, what's the difference, if any, between the Naeher Patent, No. 1,719,124, "Plaintiff's Exhibit No. 8 for identification," and the discloser in the Ernst Patent, Reissue 22,740 "Plaintiff's Exhibit No. 2 for identification"?

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

A. (Perusing document): Well, this patent (pause) is for handling——

Mr. Heubner: Now, when you say "this patent" what patent are you talking about?

The Witness: The Naecher Patent.

Mr. Heubner: All right.

The Witness (Addressing the reporter): Will you let me have what I said back there?

(The uncompleted answer of the witness was read as follows:

"A. Well, this patent (pause) is for handling"——) [88]

The Witness: This Naecher Patent "Plaintiff's Exhibit 8 for identification," is for handling grains and for compacting them.

(The witness studies the document): The vibratory action is up and down, and not sideways.

(At this juncture a long pause ensued.)

Mr. Huebner (Addressing the witness). I had asked you what the difference was, and I did not know you had finished your answer.

The Witness: Well, I was just studying this patent. I note here that while the specifications call for eccentric mechanism, the papers themselves do not call for any whatever (pause); that while the connection is in duplicate operating off of gear 29 (pause), as I say, the papers do not call for any

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

gears whatever (pause). They have only one, gear 29 and the gear 29 might revolve all day between six and seven (pause), even if they revolved all day (pause) they might revolve all day and yet no eccentricity be involved at all.

Q. (By Mr. Heubner): If you will look at figure 4 and also you find a showing in figure 2, isn't the eccentric 25 present? A. Figure four.

Mr. Huebner: Yes, of course.

The Witness (Interrupting): Yes, the eccentric strap is present (pause), yes (pause), but the shaft on which [89] it is revolving is a straight shaft all the way through (pause) there is no eccentricity to it at all.

Q. Well, the figure 25 shows the intended gyratory movement, doesn't it?

A. Yes, it shows what is intended (pause), yes (pause), but if you built the machine according to these drawings, you wouldn't do it.

Q. (By Mr. Huebner): And figure 25 shows a lateral as well as horizontal movement, doesn't it?

A. Yes, it does.

Mr. Huebner: Figure 12?

The Witness: Yes, it does.

Q. Well, would you as an engineer, have any trouble in providing the necessary corrections to make this jiggling mechanism operate?

A. I would, largely, have to re-design the whole thing.

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Q. It would be merely a case, would it not, for a source of power, transmitting power to a machine, to rotary device, and then equipment pitman to platform 12; isn't that all that is involved?

A. Yes, that's what would be necessary.

Mr. Huebner: All right.

Q. Now, the platform 12 which you refer to actually was interconnected, or if separated and somebody would connect them together, then they would constitute an [90] elongated platform, wouldn't they?

A. Well, I wouldn't say it would be an elongated platform (pause) because the platform is the stations 12.

Q. Well, suppose you put a rigid connection between two stations like 12, you would then have, in effect, one platform, wouldn't you? A. Yes.

Q. And in that case it would be an elongated platform, wouldn't it, Mr. Gearing?

A. Yes, I suppose you might say it would be.

Q. Now, I think you mentioned this Naeher apparatus is for grain; where in the specifications does it say that?

A. (Perusing document): I don't know that it does say that particularly (pause) but from the way the bag is shown connected to a spout, I would assume it was for grain, or for small material.

Q. Well now, let us summarize your comments then. In connection with a comparison of Naeher

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

and the Ernst Reissue Patent: As I understand it, it is your opinion that the only difference between Naehér and Ernst is that Naehér is intended for grain while Ernst was intended for potatoes; that's number one; is that right?

A. That is correct.

Q. Second,—the second difference is, as you read it, the vibratory mechanism of Naehér is inoperative? [91]

A. Is inoperative.

Q. While the vibrating mechanism of Ernst is operative; is that right?

A. Correct.

Q. And you, as an engineer, would be able to supply a useable operating mechanism, or at least supply the deficiency in Naehér; is that correct?

A. That's correct.

Q. And that Naehér illustrates only capacity for two bags, whereas Ernst illustrates capacity for more than two bags, and in order to match Ernst in that respect, you would have to extend platforms of Naehér; is that correct?

A. Yes.

Q. And those are the only differences?

A. Practically the only differences, yes.

Q. Now, will you please look at the British Patent of Daniel Belcher, No. 397,679 "Plaintiff's Exhibit No. 9 for identification"?

(The witness examines Plaintiff's Exhibit No. 9 for identification.)

Q. Directing your attention particularly to fig-

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

ure one, that patent shows an elongated platform, does it not? Elongated platform 11?

A. (Examining document): Yes. (Pause.) Or table.

Q. Is there any difference between a table and a platform where it is used in a machine like this to support [92] bags?

A. No. (Pause.) No great difference.

Q. On this platform 11 or table in the British Patent it is long enough to support a plurality of bags, by that I mean more than one, isn't it?

(The witness nods head in the affirmative.)

Q. That is correct, isn't it? A. It is.

Q. It is vibrated through a power pitman connection 25, is it not? A. Vertically, yes.

Q. And that connection between the pitman and the table for imparting vibration is at the central platform or table, isn't it? A. Correct.

Mr. Huebner (Addressing counsel): May I look at the patent to C. Blank, No. 805,625, "Plaintiff's Exhibit No. 12 for identification"?

Mr. Franklin: Are you through with that (indicating Plaintiff's Exhibit No. 8 for identification)?

Mr. Huebner: Yes.

(At this juncture Mr. Franklin hands to Mr. Huebner "Plaintiff's Exhibit No. 12 for identification.")

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Mr. Heubner: Thank you. (Searching through files): Let me take a look, I don't have a copy here.

Q. (By Mr. Huebner): I believe in your direct [93] examination you referred to a divider which is numbered 11 in the drawings of this patent (referring to "Plaintiff's Exhibit No. 12 for identification"). A. Yes.

Q. What's that supported on?

A. (Studying "Plaintiff's Exhibit No. 12 for identification"): That's supported on the chains 8.

Q. Those chains extend longitudinally on the moving belt? A. They do.

Q. Is the divider plate immovable along the chains?

A. It is not movable with the chains, it moves along the chains.

Q. For the purpose of selectively positioning the divider plate along the belt?

A. No, for the purpose of sweeping the material to each side of the belts.

Q. Does the chain travel in a direction opposite to the travel of the belts? A. Yes.

Mr. Huebner: All right. That is all that I want to bring out on that.

Q. Will you please refer to Buschmann Patent No. 435681, "Plaintiff's Exhibit No. 5 for identification"?

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

(The witness is studying the document in question.)

Q. That illustrates, does it not, a frame, Capital [94] C intended to support a photographic developing tray? A. Yes.

Q. That frame is shown in figure 2 and 3 of figure three; is it not? A. Yes.

Q. And it is an elongated frame, is it not?

A. Yes.

Q. If you filled in the frame from side to side you would have a table or platform, would you not?

A. Yes.

Q. The frame is mounted for vibratory action, is it not?

A. Not vibratory (pause) but an oscillating action.

Q. That oscillating action is imparted, is it not, by power action, Capital G operating through a pitman, small k? A. Yes.

Q. And that pitman is connected to the frame at the middle of it, isn't it? A. Correct.

Q. Now, will you please refer to Bradbury, Patent No. 826988, "Plaintiff's Exhibit No. 6 for identification"?

(Mr. Franklin hands the witness a document.)

(The witness is perusing the document handed to him [95] by Mr. Franklin.)

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. (By Mr. Huebner): Directing your attention to figure 1, at the upper part of that view, there is an elongated screen, "S", is there not?

A. Just a minute (pause), I want to see what this specification says.

Mr. Huebner: I will assist you by referring you to the patent, page 3, first column, beginning in line 52, where the element "S" is referred to as a "shaking (Addressing the reporter) That is hyphenated, instead of employing the word "screen," although to be correct your attention should also be referred to the use of the word "shoving" screen, in line 72, the shoe being an element, a general element, and the screen itself being defined as a "screen," 72.

Q. Under sacks, line 57, it is called a shoving screen, in line 72? A. Yes.

Q. And if you filled in the interstices or perforations in the screen 72, you would then have an elongated platform, would you not?

A. It wouldn't be of any value in the machine; you might just as well not have it there at all.

Q. But it would still be a platform, wouldn't it?

A. It still would be a platform, yes.

Q. And it is suspended by a pivoting link, 71, is [96] it not? A. Yes.

Q. And it is vibrated horizontally by means of a pitman connected at about the reference numeral 100? A. Yes.

Q. Now, that connection is at the extreme end of the machine, isn't it? A. Correct.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. Would you therefore acknowledge disclosures in the prior art, in both central connections of pitman and no connections of pitman in a vibration table or platform? A. Yes.

Mr. Huebner: That's all on that one.

(Addressing counsel): Will you please let me see your Broussard, "Plaintiff's Exhibit No. 7 for identification"?

(Mr. Franklin hands counsel document.)

Q. (By Mr. Huebner): Directing your attention to J. Broussard Patent, 1,014,444 "Plaintiff's Exhibit No. 7 for identification," would you class that as another example of a bag-filling machine which had at least two container stations? On platforms with a vibrating mechanism, intermediate to the two stations?

A. I would say this (perusing document) is a hammering action rather than a vibrating action (pause). It hits a blow, in through the stroke.

Q. Otherwise it is a kind of mechanism I [97] described in my question, is it?

A. Otherwise, yes.

Mr. Huebner: That's all I want to know on that.

Q. Will you look at the True Patent, 1,369,502, "Plaintiff's Exhibit No. 13 for identification"?

(The witness peruses the document.)

Q. (By Mr. Huebner): Now, that patent illustrates and describes a shearer plate, 36, does it not?

A. Yes.

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Q. And it is removably located in brackets 37 on frame members; isn't that correct?

A. The shearer plate is removable but the brackets 37, are not; they may be part of the frame.

Q. So you could take the shearer plates out of the bracket and put them somewhere else along the frame if you want to; is that right? A. Yes.

Q. Now, the frame on which the brackets are secured, comprises parallel plates 8 and 8 prime, does it not? A. Yes.

Q. And these plates 8 and 8 prime are located adjacent to the outside edges of a number of belts, are they not? A. That is correct.

Q. Now, given the pitching of this pan, there would be no problem, would there, in locating any desired number of brackets 37 lengthwise on the frame depending on the stations at which it was desired to place the plates?

A. No, but they would be placed in pre-determined positions, they couldn't be varied after being once placed.

Q. But there would be no problem in making as many of those stations as you wanted, would there?

A. No.

Q. In your opinion as an expert, and your familiarity with this art, is there any mechanical difference between a pair of plates or rails, such as 8 and 8 prime, of the True Patent, or rods or bars similarly located?

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

A. Well, the frames 8 and 8 prime are part of the machine and carry bearings for the conveyor belts.

Q. Well, your point is that rods or wires would constitute an additional element; is that it?

A. They would constitute an additional element, yes.

Q. And they would be located in substantially the same way to support shearer plates?

A. No, they wouldn't function to support shearer plates such as 36, because 36 is not provided with any means for holding it on a rod.

Q. You would simply have to add a couple of bolts between plates 36 and the rods; isn't that correct?

A. No, you would have to make your shearer plates [99] movable.

Q. Now, if you wanted to make this shearer plate 36 movable along the mechanism of upper 8 and 8 prime, what would you do, to support the position of the plate along that frame?

A. You would have to provide connections on the shearer plate that would suitably fit the framework.

Q. You get that by attaching shoes or rollers to the ends of the shearer plate so that the shoes or rollers would roll or slide along the upper members of 8 and 8 prime? A. Yes.

Q. Now, that would be within your experience as a skilled artist in this field, would it not?

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

A. Yes.

Mr. Huebner (Addressing counsel): May I see another patent that you have, the C. MacBeth Patent, No. 1,465,619. I think it is "Plaintiff's Exhibit No. 14 for identification."

Mr. Franklin (Handing Notary the document): You better mark that, that hasn't been marked.

(The said document was marked by the Notary "Plaintiff's Exhibit No. 14 for identification.")

Q. (By Mr. Huebner): Now, directing your attention, Mr. Gearing, to MacBeth, 1,465,619, "Plaintiff's Exhibit No. 14 for identification", the feature of that in which we are interested is, I believe, the diverter element; is that right?

A. I would presume so, yes.

Q. What's that number (indicating) in the drawing?

A. (Examining document): Well, it's D2 and yet they have got "D2" in another place. (Pause) Let's see if they got it——

Q. Well, that, approximately identifies it, doesn't it?

A. Well, there is G3 and G2 on one side, and it says "G3" on the other side.

Q. Now, that diverter is supported for slideable

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

movement on a pair of rollers or frame members, isn't it? A. No.

Q. How is it supported?

A. Its supported over the roller members but its in a fixed relation to the vulcanizing chamber.

Q. Then if you wanted to move it what would you have to do to it?

A. You would have to unbolt it from the frame and you would have to remove your vulcanizer at the same time, (pause) otherwise you would throw your molds on the floor.

Q. Well, Mr. Gearing, if you detached the diverter [101-A] from the vulcanizer, however, you could slide that vulcanizer along the frame, couldn't you?

A. Yes, if you detached it from the vulcanizer.

Mr. Huebner: That's all on that one.

(Addressing counsel): One more, Mr. Franklin, you have Paisley; that's been marked "Plaintiff's Exhibit No. 15 for identification"?

Mr. Franklin: Yes.

Mr. Huebner: Can I borrow it, please?

Mr. Franklin: All right. (Hands counsel document)

Q. (By Mr. Huebner): Will you refer to P. A. Paisley Patent, No. 1,818,427; (Addressing the Notary) do you want to mark this one "Plaintiff's Exhibit No. 15 for identification"?

The Notary: Yes.

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

(The said document so referred to by counsel was thereupon marked by the Notary "Plaintiff's Exhibit No. 15 for identification.") [102]

Mr. Huebner: Now, Mr. Gearing, will you refer to Paisley, "Plaintiff's Exhibit No. 15 for identification", I think you said that was a mining apparatus patent? A. Yes.

Q. That's right, isn't it, Mr. Gearing?

A. Yes. (Pause) For loading cars.

Q. And does it have a diverting plate in it?

A. It says a diverting shoe for delivering the material from the conveyor belt to both sides.

Q. Is it movable to different locations?

A. Yes.

Q. To which is it supported?

A. It is supported on top of the frame of the conveyor.

Q. Can it be slid along that frame to different locations? A. Yes.

Q. And how do you maintain that in position after you have moved it to the different locations?

A. By tying it into position to clevises.

Q. That then is intended, is it not, as a shiftable diverter plate, so that it may be located at different stations along the track; is that right?

A. That's correct.

Q. Well then the novelty, if any, in the Ernst Patent Re-issue No. 22,740, lies, does it not, in

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

the [104] specific design of the shearer plate and the connection of the sleeves to the plate?

A. Give me that question again, will you please?

(Last question read by the reporter.)

A. No, it also embodies the novel means of vibration (pause) embodies the novel means of vibrating the jigger board as well as the use of the shearer plate.

Mr. Huebner: All right then, I will ask that same question in respect to—just a minute—(addressing the reporter) Strike that out, will you?

Q. Still referring to the Re-issue Patent, let us get clear what, in your opinion is the novel means then of jiggling the platform or board?

A. Well, the novel means is the way in which the platform is hung (pause) the arrangement of it, to make it convenient for to hang potato sacks on the framework adjacent to the conveyor belt (pause) and means for jiggling the jigger board (pause) and providing means whereby the potatoes may be diverted to any particular sack on the machine.

Q. Now, referring to the other Ernst Patent No. 2,288,159 "Plaintiff's Exhibit No. 1 for identification" it is true, is it not, that the only novelty present in that disclosure is the specific design of the sleeves and their attachment to the shearer plate, 52?

A. Patent No. 2,288,159 (pause) deals more directly [105] with the shearer plate, yes.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. Well, is there any novelty in it other than the specific design of sleeves 54, and their attachment to the shearer plate, 52?

A. Only the novelty of the simplicity of the mechanism.

Mr. Huebner: All right.

(Addressing the reporter): Off the record, for a minute.

(Discussion.)

Mr. Huebner (Addressing the reporter): We are on the record, again. There will be no further cross examination.

(Discussion off the record.)

Mr. Franklin (Addressing counsel): You are through, are you?

Mr. Huebner: Yes.

Mr. Franklin: All right.

Redirect Examination

By Mr. Franklin:

Q. We will take this patent (handing the witness a document) Naehar, "Plaintiff's Exhibit No. 8 for identification", No. 1,719,124, what kind of a movement does the so-called platform have in this Naehar Patent "Plaintiff's Exhibit No. 8 for identification"? [106]

A. It doesn't have any movement at all, according to the drawings.

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Q. Well, what is meant by a "gyratory movement" as the specification states there?

A. A movement, more or less, around a center.

Q. "Around a center"? A. Yes.

Q. What does figure five show in that patent?

A. Figure five is a diagrammatic view (pause) showing the supposed path of the bag (pause) in its gyratory movement.

Q. Is there a gyratory movement in the Ernst Patent, Re-issue 22,740 "Plaintiff's Exhibit No. 2 for identification"?

A. There is a vibratory movement.

Q. I said a "gyratory" movement.

A. No.

Q. What kind of a movement does it have, the vibratory movement?

A. A straight oscillating movement (pause) back and forth.

Mr. Franklin: Now, you say a straight oscillating movement back and forth!

Q. Do you call that "oscillating"?

A. Yes.

Q. Back and forth? A. Yes. [107]

Q. Well, the same one says, "means attached to the pitman for reciprocating"?

A. Well, "reciprocating" "vibrating" or "oscillating" (pause) they are one and the same thing.

Mr. Franklin: Now, let's see.

Q. In the Stehlin Patent, No. 191243, "Plaintiff's Exhibit No. 3 for identification", is there any

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

endless conveyor associated with the bags supporting means for feeding material into the bags?

A. No.

Q. How are the bags filled?

A. They are filled from a hopper, over the top of the machine.

Q. Is there any suggestion in that patent for filling more than one bag at a time?

A. Yes, that's shown in figure 9.

Mr. Franklin: Figure nine.

Q. Well, how is that done?

A. That's done from a central hopper.

Q. Connected to the three different spouts leading to the bags?

A. Three different spouts.

Q. Spouts, leading to the bags?

A. Spouts leading to the bags.

Q. Is that location suitably located adjacent to, [109] and fed from, a straight endless conveyor?

A. No.

Q. Take this Belcher Patent, No. 397679, "Plaintiff's Exhibit No. 9 for identification"; take the table 11; is that table reciprocated?

A. Up and down, yes.

Q. Is it reciprocated longitudinally?

A. No, reciprocated vertically.

Q. Does it have bags stationed to hold the bags stationed on it? A. No.

Q. How are the bags operated on that table 11?

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

A. They are fed into a primary mechanism which forms part of the general machine which sizes the bag as to its width, and compacts the material sideways (pause) and then when it passes onto this table it's vibrated vertically, so as to settle the material down to a solid mass.

Q. Well, does that table have stations to hold the bags on the stationary position on the table?

A. No, the bags are moving all the time (pause) new bags are moving all the time.

Q. Take the Buschmann patent, that is "Plaintiff's Exhibit No. 5 for identification", I will ask if that is a platform which is reciprocated?

A. It has a frame which is oscillated.

Q. Well, describe how it is oscillated? [109]

A. Well, it's hung over a central bar or trunion (pause) or trunions in the center of the longitudinal lengths of the frame. The frame, however, could be square, made in this shape (pause), made to carry a pan which is elongated and simply oscillated back and forth, which carries a chemical solution to cover the surface of a photographic tray to cause the development of the plate.

Q. Is the tray mounted?

A. It is mounted on trunions.

Q. On "trunions"? A. Yes.

Q. Or pivots? A. On pivots.

Q. Does it rock?

A. Yes, it rocks back and forth.

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

Q. Now, referring to the F. J. Ernst, No. 2,288,159 "Plaintiff's Exhibit No. 1 for identification", and particularly to the sleeves 54 and 55, shearer blade 52 is connected, the sleeves are fitted on rods 56-57 to slide on the rods.

Now, we will refer to Exhibit 1 and Exhibit 2 of the interrogatories, showing the defendants' trolley on the rods; does the defendants' trolley perform any different function from the sleeves of the Ernst Patent "Plaintiff's Exhibit No. 1 for identification"? A. No. [110]

Q. Do they slide on the rod with a little pressure applied to the shearer? A. Yes.

Q. Do you consider the shearer trolley of the defendants' machine, the mechanical equivalent of the sleeves 54 and 55 of the shearer, of the Ernst machine, "Plaintiff's Exhibit No. 1 for identification"? A. Yes.

Mr. Franklin: I think that's all.

Recross Examination

By Mr. Huebner:

Mr. Huebner: Now, I have just a few questions.

Q. Mr. Gearing, if you swing a pendulum suspended from the fixed point, what's the movement of the pendulum? A. It forms an arc.

Q. It is a compound horizontal and vertical movement?

(The witness nods his head in the affirmative.)

Plaintiff's Exhibit 16—(Continued)
(Deposition of Harry Gearing.)

Mr. Huebner: He (the reporter) didn't get your answer:

The Witness: Yes.

Q. (By Mr. Huebner): The jigger board or platform of the Ernst Patent, Re-issue 22740, is suspended in a manner similar to a pendulum, isn't it? A. Somewhat similar. [111]

Q. Then the vibratory movement in the jigger board in Ernst is a compound vertical and horizontal movement, isn't it? A. Correct.

Q. Now, have you ever seen one of the defendants' machines such as illustrated in the photographs, such as Mr. Franklin shows, attached to the plaintiff's No. 1 and 2 of the interrogatories?

A. Have I ever seen any one of the machines?

Mr. Huebner: Yes.

The Witness: No.

Q. Have you any personal knowledge as to whether the trolleys on the rods rest easily or are distorted?

A. Not any personal knowledge, but I would say from the photographs I would judge they roll easily.

Q. Is it your opinion from an examination of the defendants' machine as illustrated by the photograph, that the shearer plates as supported by the trolleys, would remain in position without a latch or catch? A. No.

Q. You think it would require a latch or catch on the defendants' trolleys, or associated with them,

Plaintiff's Exhibit 16—(Continued)

(Deposition of Harry Gearing.)

to make the shearer plates stay in position?

A. I do.

Q. Is a shearer plate or catch required to make the Ernst Patent 2,288,159 remain in position when located? [112]

A. No.

Mr. Huebner: That's all.

Re-Redirect Examination

By Mr. Franklin:

Q. Your answer is based, of course, on the photographs and what you heard about it?

A. That's correct.

Q. What you heard about the trolleys and the shearer of the defendants' machine; is that right?

A. That is right.

Q. Suppose those trolley wheels fitted rather tight on the rods, suppose the shearer blade was of substantial weight, would you say that they would remain of its own inertia along the rods toward which it was moved?

A. No. I would be inclined to feel there would be a creeping action at all times.

Mr. Franklin: That is all.

Mr. Huebner: No further questions.

/s/ HARRY GEARING

Signature of Witness. [113]

Plaintiff's Exhibit 16—(Continued)

State of California,

County of Los Angeles—ss.

Certificate of Officer Taking Deposition

I, Paul Lehnhardt, Jr., a Notary Public in and for the County of Los Angeles, State of California, duly commissioned to administer oaths,

Do Hereby Certify:

That, the witness in the foregoing deposition, to-wit: Harry Gearing, was produced as a witness on behalf of the plaintiff herein;

That, before giving his said testimony said witness was duly sworn by me, according to law, to speak the truth, the whole truth and nothing but the truth;

That, the said deposition was taken pursuant to the "Stipulation" (copy of which is hereto annexed) and pursuant to the further stipulations of counsel for the respective parties, orally embodied herein, and made a part hereof;

That, the said deposition was so signed and corrected the hour of 2:00 o'clock p.m., on Monday, the 28th day of February, 1949, at the law offices of Messrs. Huebner, Beehler, Worrel, Herzig & Caldwell, located in the Story Building, Broadway at Sixth, Los Angeles, California;

I Further Certify, that the said deposition was duly taken down by me in shorthand writing, and was thereafter under my supervision and direction, transcribed into typewriting;

That, at the conclusion of the taking of said depo-

Plaintiff's Exhibit 16—(Continued)

sition, it was agreed by and between counsel for the respective parties that the undersigned officer taking said deposition arrange to read said deposition when transcription is finished, to the said witness, Harry Gearing, at a place and time agreeable to said witness, and the said officer taking the said deposition, for purposes of complying with the statutory provision anent reading and signing;

That, the said deoposition was so signed and corrected before the Notary, the undersigned officer taking the said deposition, on the 4th day of March, 1949, as fully appears on page 113 of this said deposition.

I Further Certify, that I am in no way interested in the outcome or event of said litigation; nor am I related to any of the parties to said cause or the counsel engaged therein.

In Witness Whereof, I have hereunto subscribed my signature and affixed my official seal of office, this 4th day of March, 1949.

[Seal] /s/ PAUL LEHNHARDT, JR.,
Notary Public in and for the County of Los Angeles,
State of California.

Plaintiff's Exhibit 16—(Continued)
 [Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed to by and between the parties to the above-entitled action, through their respective attorneys, that the deposition of Harry Gearing and others may be taken on behalf of the plaintiff, at 410 Story Building, 6th & Broadway, Los Angeles, California, on Monday, February 28, 1949, at the hour of 2 o'clock in the afternoon of that day, said deposition to be continued from day to day until completed.

Dated: This 28th day of February, 1949, at Los Angeles, California.

/s/ ALAN FRANKLIN,

Attorney for Plaintiff.

/s/ HERBERT A. HUEBNER,

/s/ RICHARD M. WORREL,

Attorneys for Defendants.

Approved And It Is So Ordered

.....,

Judge.

[Endorsed]: Filed March 8, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of Califor-

nia, do hereby certify that the foregoing pages numbered from 1 to 48, inclusive, contain the original Complaint for Infringement of Letters Patent; First Amended Answer to Complaint; Stipulation Concerning Use of Copies of Documentary Evidence; Decision; Findings of Fact and Conclusions of Law; Final Judgment; Notice of Appeal; Two Orders Extending Time to Docket Appeal; Undertaking for Costs on Appeal; Plaintiff's Designation of Contents of Record on Appeal and Defendants-Appellees' Counter-Designation of Contents of Record on Appeal which, together with copy of reporter's transcript of proceedings on March 8 and 9, 1949, in two volumes, original plaintiff's exhibits 1, 2, 2-A, 3 to 10, inclusive, 11-A to 11-C, inclusive, 12-A, 12-B, 13 to 15, inclusive and 16 with exhibits Nos. 3 to 16, inclusive, thereto; and original defendants' exhibits A to I, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 5th day of August, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ EDWARD F. DREW,
Deputy.

In the United States Court of Appeals
For the Ninth Circuit

Civil Action No. 721 So. Dist. of California,
Northern Div. (Undocketed)

EARL A. ERNST,

Plaintiff,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G.
CLEMENS and H. G. McBRIDE, doing busi-
ness as IDEAL MANUFACTURING COM-
PANY,

Defendants.

STIPULATION EXTENDING TIME TO
SERVE AND FILE A DESIGNATION OF
ADDITIONAL PORTIONS OF THE REC-
ORD, ETC., AND TO FILE AND DOCKET
APPEAL

It is hereby stipulated and agreed by and between the parties to the above-entitled action, through their respective attorneys, that the defendant (appellee) may have to and including August 2, 1949, within which to serve and file a designation of additional portions of the record, proceedings, and evidence to be included in the designation of the contents of the record on appeal, and that the plaintiff (appellant) may have to and including

August 11, 1949, within which to file and docket his appeal.

/s/ ALAN FRANKLIN,
Attorney for Plaintiff
(Appellant).

/s/ HERBERT A. HUEBNER,
Attorney for Defendants
(Appellees).

It Is So Ordered:

WILLIAM DENMAN,
WILLIAM HEALY,
HOMER T. BONE,

Judges of U.S. Court of Appeals, Ninth Circuit.

[Endorsed]: Filed July 22, 1949.

PAUL P. O'BRIEN,
Clerk.

A True Copy

Attest: July 22, 1949.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk.

[Title of Court of Appeals and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Alan Franklin, being duly sworn, deposes and says: That he is the attorney for the plaintiff (appellant) in the above-entitled action; that the ninety-day period, from the date of the notice of appeal, for filing and docketing the plaintiff's appeal, according to Rule 73, F.R.C.P., (g), will expire on July 23, 1949; that he has been delayed in filing and docketing said appeal entirely by the failure of the court reporter to complete the typing of Volume II of the Reporter's Transcript of Proceedings of the trial of the case, until July 12, 1949; that said Volume II of the Reporter's Transcript contains all of the testimony of the defendants' expert and other important testimony, and a list of a number of important exhibits of both parties to said action, which testimony and list of exhibits were not otherwise available to affiant, and consequently he could not prepare and file the plaintiff's (appellant's) designation of contents of record on appeal without a careful study of the testimony and the exhibits listed in said second volume of the Reporter's Transcript; that the Plaintiff's Designation of Contents of Record on Appeal will be filed this 19th day of July, 1949, but the time remaining between this day and July 23, 1949, when the time for filing said designation of record

will expire, will not amount to ten days, to which the defendants are entitled, according to Rule 75(a) F.R.C.P. to serve and file their designation of additional portions of the record, proceedings, and evidence to be included; that defendants' counsel, one of whom resides in Los Angeles and the other in Fresno, California, desire an extension of time to and including August 2, 1949 to file the defendants' designation of additional portions of the record, etc. to be included in the Designation of Contents of Record on Appeal, and such extension is agreeable to the plaintiff and his counsel; that it required about four days to try said case; and that affiant has worked very hard, since he received the second and last volume of the Reporter's Transcript, on July 12th, to prepare and file the Plaintiff's Designation of Contents of Record on Appeal, in time to give the defendants' counsel ten days, by July 23, 1949, to file the defendants' designation, but affiant has found it impossible to file the plaintiff's designation sooner.

/s/ ALAN FRANKLIN,
Attorney for Plaintiff
(Appellant).

Subscribed and sworn to before me this 19th day of July, 1949.

[Seal] /s/ EUGENE N. FRANKENBERGER,
Notary Public in and for said County and State.

[Endorsed]: Filed July 25, 1949.

At a Stated Term, to wit: The October Term 1948, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday the twenty-first day of September in the year of our Lord one thousand nine hundred and forty-nine.

Present: Honorable William Healy, Circuit Judge,
Presiding, Honorable Homer T. Bone,
Circuit Judge, Honorable Walter L. Pope,
Circuit Judge.

No. 12323

EARL A. ERNST,

Appellant,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G.
CLEMENS and H. G. McBRIDE, doing busi-
ness as IDEAL MANUFACTURING COM-
PANY,

Appellees.

ORDER DENYING MOTION TO ENLARGE DESIGNATION OF TRANSCRIPT

Upon consideration of the motion of appellant for an order allowing appellant's supplemental designation of additional portions of the record on appeal to be printed, and allowing filing of plaintiff's objections to proposed findings of fact and conclusions of law and plaintiff's objections to proposed

final judgment, and of the memorandum of appellees opposing such motion, and good cause therefor appearing,

It Is Ordered that said motion be, and hereby is denied for the reason that the matter sought to be added is unnecessary for a full presentation of the case.

[Endorsed]: No. 12323. United States Court of Appeals for the Ninth Circuit. Earl A. Ernst, appellant, vs. A. G. Clemens and H. G. McBride, and A. G. Clemens and H. G. McBride, doing business as Ideal Manufacturing Company, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed August 8, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12323

EARL A. ERNST,

Plaintiff,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G.
CLEMENS and H. G. McBRIDE, doing busi-
ness as IDEAL MANUFACTURING COM-
PANY,

Defendants.

STATEMENT OF POINTS ON APPEAL

Plaintiff, Earl A. Ernst, now files the following Statement of Points asserted as errors and intended to be urged in the prosecution of his appeal from the Final Judgment entered herein on or about March 28, 1949, and asserts that the trial court erred in each of the following respects, to wit:

1. In holding and deciding that Claim 1 of Patent No. 2,288,159 (F. J. Ernst), issued June 30, 1942, is not infringed by the defendants.

2. In holding and deciding that Claim 1 of Re-issue Patent No. Re 22,740, reissued on April 2, 1946, is not infringed by the defendants.

3. In rendering judgment for the defendants; neither side to recover any costs.

4. In not adjudging and decreeing that Claim 1

of Patent No. 2,288,159 of Frederick J. Ernst, issued June 30, 1942, is infringed by the defendants, and each of them.

5. In not adjudging and decreeing that Claim 1 of Reissue Patent Re No. 22,740, of Earl A. Ernst, reissued on April 2, 1946, is infringed by the defendants, and each of them.

6. In failing to render judgment for the plaintiff as prayed, including his costs, an injunction, and an accounting for damages against defendants, and each of them.

7. In unduly limiting Claim 1 of Letters Patent in suit, No. 2,288,159, to such narrow scope as to enable the defendants to escape infringement of said claim, and despite the failure of the prior art to impose any such limitation upon said claim.

8. In unduly limiting Claim 1 of Reissue Letters Patent No. Re. 22,740, in suit, to such narrow scope as to enable the defendants to escape infringement of said claim, and despite the failure of the prior art to impose any such limitation upon said claim.

9. In failing to accord Claim 1 of Letters Patent No. 2,288,159, in suit, its proper and full scope beyond the prior art, to which it is fairly entitled, and in failing to hold the defendants' accused machines infringements of said claim in accordance with its true scope.

10. In failing to accord Claim 1 of Reissue Letters Patent No. Re. 22,740, in suit, its proper and

full scope beyond the prior art, to which it is fairly entitled, and in failing to hold the defendants' accused machines infringements of said claim in accordance with its true scope.

11. In failing to give Claim 1 of Letters Patent No. 2,288,159, in suit, a liberal interpretation, in view of the substantial advance in the art made by the invention covered by said claim, and in failing to hold the defendants' accused machines infringements of said claim as so interpreted.

12. In failing to give Claim 1 of Reissue Letters Patent No. Re. 22,740, in suit, a liberal interpretation, in view of the substantial advance made in the art by the invention covered by said claim, and in failing to hold the defendants' accused machines infringements of said claim, as so interpreted.

13. In failing to recognize the long step forward, taken by the inventions, as covered by the claims in issue of the patents in suit, and the substantial advance in the art marked by said invention, and in failing to apply the applicable rule of construction to said claims, which entitled said claims to a liberal construction, whereby said claims may be read to include the defendants' accused potato-sacking machines, and to establish infringement of said claims by the defendants' and each of them.

14. In deciding and holding, contrary to the evidence, that Claim 1 of Patent No. 2,288,159 (F. J.

Ernst), issued June 20, 1942, is not infringed by the defendants.

15. In deciding and holding, contrary to the evidence, that Claim 1 of Reissue Patent No. Re. 22,740, reissued on April 2, 1946, is not infringed by the defendants.

16. In failing to order, adjudge and decree, in the formal judgment of the court, that Claim 1 of Patent No. 2,288,159 of Frederick J. Ernst, issued June 30, 1942, is good and valid in law, in accordance with the decision of the court, dated and filed March 12, 1949.

17. In failing to order, adjudge and decree, in the formal judgment of the court, that Claim 1 of Reissue Patent No. Re. 22,740, reissued on April 2, 1946, is good and valid in law in accordance with the decision of the court.

18. In not finding that the inventions, as defined by the claims in issue of the patents in suit, are a distinct advance in the art and rendered all other systems in the art obsolete.

19. In not finding that the defendants did not follow the prior art in their alleged noninfringing machines, but followed and adopted the systems defined by the claims in issue of the patents in suit.

20. In not holding that the patents in suit marked a distinct advance in the art over and beyond the skill of the calling.

21. In not finding that the plaintiff's method

and devices, as defined by the claims in issue of the patents in suit, supplanted all other systems of like nature in the potato-sacking art.

22. In that the several findings and conclusions are not in accordance with the facts or in accordance with the law of the case.

23. In holding that the inventions in suit are in a crowded art, as contrary to the evidence and contrary to law.

24. In failing to find that none of the prior patents pleaded by the defendants were ever adopted or used, and that said patents are of the paper type.

25. In finding IX as contrary to the evidence and contrary to law.

26. In finding X as contrary to the evidence and contrary to law.

27. In holding and deciding that Claim 1 of the patent in suit, No. 2,288,159, is required to be narrowly construed and thus construed is valid, but not infringed by the defendants.

28. In failing to order, adjudge and decree that Claim 1 of the patent in suit, No. 2,288,159, is entitled to a liberal interpretation commensurate with its broad scope in view of the prior art and in view of the fact that said patent marked a substantial advance in the art, and thus interpreted is good and valid in law, and is infringed by the accused devices of the defendants and each of them.

29. In holding and deciding that claim 1 of the patent in suit, Reissue 22,740, is required to be narrowly construed and thus construed is valid, but not infringed by the defendants and each of them.

30. In failing to order, adjudge and decree that Claim 1 of the patent in suit, Reissue 22,740, is entitled to a liberal interpretation commensurate with its broad scope, in view of the prior art, and in view of the fact that said patent marked a substantial advance in the art, and thus interpreted is good and valid in law, and is infringed by the accused devices of the defendants and each of them.

31. In holding and deciding that the Complaint should be dismissed for want of equity, as to the charge of infringement by the defendants of the patents in suit.

32. In Ordering, Adjudging and Decreeing that the Complaint herein be and it is hereby dismissed upon the merits.

Wherefore, plaintiff prays that the Final Judgment entered herein on or about the 28th day of March, 1949, by the District Court below, dismissing the Complaint herein upon the merits, be reversed, and that the District Court be directed to enter an interlocutory Judgment reversing said Final Judgment by adjudging the patents in suit valid, and infringed by the defendants and each of them, enjoining the defendants and each of them from further infringement of the Letters Patent in suit, and referring this cause to a Master to be appointed

by the said District Court to determine and report to said court the damages resulting from such infringement.

EARL A. ERNST,

By /s/ ALAN FRANKLIN,

Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed September 1, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER OMITTING
TITLES, ETC., FROM PLEADINGS AND
OTHER PAPERS

It Is Hereby Stipulated by and between the respective parties in the above-entitled cause, through their respective counsel, that the title and caption of this cause on the respective papers appearing in the printed transcript of record may be eliminated and substituted therefor the following: "Title and Cause."

It Is Further Stipulated that the complete filing reference by the Clerk on the respective papers appearing in the printed transcript of record may be eliminated and substituted therefor the word "Filed" followed by the date on which the paper was filed.

It Is Further Stipulated that all acknowledgments

of service on the respective papers appearing in the printed transcript of record may be eliminated.

Dated this 19th day of August, 1949.

/s/ ALAN FRANKLIN,
Attorney for Plaintiff.

/s/ HERBERT A. HUEBNER,
Attorney for Defendant.

Approved And So Ordered.

[Endorsed]: Filed September 1, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION FOR CORRECTIONS
IN DEPOSITION OF HARRY GEARING

It Is Hereby Stipulated and Agreed by and between the parties to the above-entitled action, through their respective attorneys, subject to the approval of the Court, that the corrections specified below may be made by the Clerk in the deposition of Harry Gearing, Plaintiffs Exhibit 16, as follows:

Page 9, line 19, after—"Identification"—change the comma to a period, and omit the remainder of said line, and line 20.

Page 17, line 20, after—"2/23/49"—change the comma to a period, and omit the remainder of said line, and lines 21 to 23 inclusive.

Omit pages 17-A and 17-B.

Page 18, line 13, after—"Identification"—change the comma to a period, and omit the word—"and"—. Omit lines 14 and 15.

Omit page 18-A.

Page 23, line 12, after — "Identification" — change the comma to a period and omit the remainder of said line, and line 13.

Omit page 23-A.

Page 25, line 26, after — "Identification" — change the comma to a period, and omit the remainder of said line.

Omit pages 26 and 26-A.

Page 29, line 5, after — "Identification" — change the comma to a period and omit the remainder of said line, and lines 6 and 7.

Omit page 29-A.

Page 31, line 14, after—"Exhibit 7"—place a period and omit the remainder of said line, and line 15.

Omit pages 31-A and 31-B.

Omit pages 31-AA, 31-AAA, 31-AAAA and 31-AAAAA, containing "addenda or supplemental transcript" after page 31-B.

Omit page 32, but rewrite said page as follows:

Q. (By Mr. Franklin): How many bags does that machine fill? (Referring to "Plaintiff's Exhibit No. 7 for Identification.")

A. (Perusing document): Two.

Q. When you fill the two, do you have to take them off and put new ones on, unfilled?

A. Yes, they have to be removed and new ones put in their place.

Q. Two at a time? A. Yes.

Q. Does that machine have a platform including an elongated container station at the end thereof? A. No.

Q. In which a plurality of bags are supported in the container stations? A. No.

Q. I will hand you the patent to Naecher No. 1,719,124 "Bag Filling Machine."

(Mr. Franklin hands the document to the Notary.)

The Notary: You are asking that this be marked "Plaintiff's Exhibit No. 8 for Identification"?

Mr. Franklin: Yes.

The Notary: This document which you have just handed me?

Mr. Franklin: Yes.

The said document was thereupon marked by the Notary "Plaintiff's Exhibit No. 8 for Identification."

Q. (By Mr. Franklin): Does that machine have a platform including an elongated surface with container stations from the ends thereof, in which stations are supported bags to be filled?

A. (Perusing patent): No.

Q. (By Mr. Franklin): Well, I will hand you the British patent to Daniel Belcher, No. 397,679 (handing witness document), and ask you to examine it.

Excuse me. First I will ask the Notary to mark that for Plaintiff's Exhibit No. 9 for Identification.

The said document was thereupon marked by the Notary for "Plaintiff's Exhibit No. 9 for Identification."

Omit Page 32-A.

Page 35, line 20, after—"Identification"—change the comma to a period, and omit the remainder of said line, and lines 21 and 23.

Omit page 35-A.

Page 36, line 22, after—"Identification"—change the comma to a period, and omit the remainder of said line, and lines 23 and 26.

Omit page 36-A.

Page 36-B, line 5, after—"Identification"—place a period, and omit the remainder of said line, and lines 6 and 7.

Omit page 36-C.

Page 41, line 25, after—"Identification"—change the comma to a period, and omit the remainder of said line and line 26.

Omit page 41-A.

Page 47, line 16, after—"Identification" change the comma to a period and omit the word—"and"—Omit lines 17 and 18.

Omit page 47-A.

Page 48, line 6, after—"Identification"—change the comma to a period, and omit the word—"and"—Omit lines 7 and 8.

Omit page 48-A.

Page 52, line 10, after—"Identification"—

change the comma to a period, and omit the remainder of said line, and lines 11 and 12.

Omit page 52-A.

Omit page 101.

Page 102, line 18, after — “Identification” — change the comma to a period, and omit the remainder of said line, and line 19.

Omit page 103.

Page 113, omit lines 23 to 26, inclusive.

Omit pages 114 to 116 inclusive.

Dated August 29, 1949.

HERBERT A. HEUBNER and
RICHARD M. WORREL,

By /s/ HERBERT A. HEUBNER,
Attorneys for Defendants.

/s/ ALAN FRANKLIN;
Attorney for Plaintiff.

Approved and it is so Ordered.

/s/ LEON R. YANKWICH,

[Endorsed]: Filed September 1, 1949.

[Title of Court of Appeals and Cause.]

A P P E L L A N T ' S DESIGNATION OF POR-
TIONS OF THE RECORD ON APPEAL
TO BE PRINTED

To the Clerk of the United States Court of Ap-
peals for the Ninth Circuit:

Please have printed, pursuant to Rule 19 of the Rules of Practice of the United States Court of Appeals, for the Ninth Circuit, the portions of the Record on Appeal of the above-entitled cause, as follows:

1. Complaint.
2. First Amended Answer.
3. Decision of U. S. District Judge, dated the 12th day of March, 1949.
4. Findings of Fact and Conclusions of Law, dated the 28th day of March, 1949.
5. Final Judgment entered the 28th day of March, 1949.
6. Notice of Appeal.
7. Cost Bond on Appeal.
8. Stipulation Concerning Use of Copies of Documentary Evidence.
9. Order Extending Time to File Record and Docket Appeal, dated June 2, 1949.
10. Order Extending Time to File Record and Docket Appeal, dated July 1, 1949.

11. Stipulation Extending Time to File Plaintiff's Designation of Contents of Record on Appeal.

12. Plaintiff's Designation of Contents of Record on Appeal, dated July 18, 1949.

13. Defendants-Appellees' Counter-Designation of Contents of Record on Appeal.

14. This, Appellant's Designation of Portions of the Record on Appeal to be Printed.

15. Letters of Administration of Frederick J. Ernst.

16. Assignment of Letters Patent in suit, No. 2,288,155 of Frederick J. Ernst to plaintiff-appellant, Earl A. Ernst.

17. Plaintiff's Interrogatories.

18. Defendants' Answers to Plaintiff's Interrogatories.

19. Stipulation For Corrections in Deposition of Harry Gearing, dated the 2nd day of August, 1949.

20. Stipulation for Corrections in Deposition of Harry Gearing, dated August 24, 1949.

21. Deposition of Harry Gearing, Plaintiff's Exhibit 16, as corrected by Stipulations dated August 2, 1949 and August 29, 1949, respectively.

22. Reporter's Transcript of Proceedings at the Trial, in Two Volumes.

23. Stipulation and Order Omitting Titles, etc., from Pleadings and Other Papers.

24. Statement of Points on Appeal.
25. Order for Transmission of Exhibits.
26. Order Exhibits Be Not Printed. Not entered.
27. Certificate of Clerk of United States Court of Appeals for the Ninth Circuit.

Dated: Los Angeles, California, August 30, 1949.

Respectfully,

/s/ ALAN FRANKLIN,
Attorney for Appellant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed September 1, 1949.